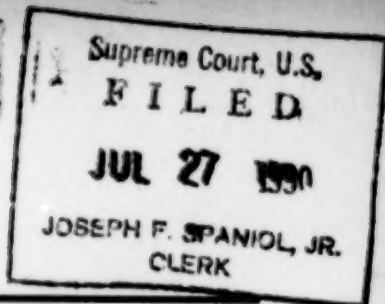


(6)
No. 89-1416



Supreme Court Of The United States

October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,

Petitioner,

v.

AMERICAN POSTAL WORKERS UNION,

AFL-CIO, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia

JOINT APPENDIX

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Petition for Certiorari Filed March 8, 1990 - Certiorari Granted June 4, 1990

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The following opinion, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PLAINTIFF AMERICAN POSTAL WORKERS UNION, AFL-CIO, et al.	DEFENDANT UNITED STATES POSTAL SERVICE
---	---

CIVIL ACTION NO. 87-3199

DATE	NO.	PROCEDURES
11/25/87	1)	Filed complaint for declaratory and injunctive relief.
12/18/87	2)	Filed plaintiffs' first set of interrogatories.
12/18/87	3)	Filed plaintiffs' first request for production of documents.
01/15/88	4)	File defendant's motion for a protective order, memorandum of points and authorities in support thereof, and proposed order.
01/21/88	5)	Notice of Judge Richey setting a conference, order announcing Rule 26 through Rule 37 motions not favored, and Judge Richey's trial certification sheet.
01/25/88	6)	Filed defendant's answer to the complaint.
01/29/88	7)	Air Courier Conference of America's (ACCA) motion to intervene, memorandum of points and authorities in support thereof and proposed order.

02/05/88	8)	Plaintiffs' cross-motion to compel discovery, opposition to defendant's motion for a protective order and memorandum in support of cross-motion to compel discovery, and proposed order.
02/11/88	9)	Filed order granting defendant's motion for a protective order.
02/11/88	10)	Filed order granting plaintiffs' motion for an extension of time.
02/18/88	11)	Filed defendant's motion for enlargement of time and memorandum of points and authorities in support thereof, and proposed order.
02/18/88	12)	Order granting defendant's motion for enlargement of time.
02/19/88	13)	Filed defendant's response to ACCA's motion to intervene.
02/26/88	14)	Order granting ACCA's motion to intervene.
02/29/88	15)	Order setting briefing schedule for case disposition on cross-motions for summary judgment.
03/10/88	16)	Filed plaintiff's first set of interrogatories to ACCA.
03/10/88	17)	Filed plaintiff's first request to ACCA for production of documents.
03/25/88	18)	Filed defendant's motion to dismiss or in the alternative for summary judgment, defendant's statement of material facts as to which there is no genuine issue, memorandum of points and authorities in support of motion to dismiss, declaration of

		Charles D. Hawley and proposed order.
03/25/88	19)	Filed defendant's first notice of filing, declaration of Charles D. Hawley and index to administrative record.
04/12/88	20)	ACCA's objections to plaintiff's first set of interrogatories.
04/12/88	21)	ACCA's memorandum of points and authorities in support of defendant's motion to dismiss or in the alternative for summary judgment.
04/12/88	22)	ACCA's Notice of address change.
04/22/88	23)	Filed order setting hearing on motion for summary judgment or to dismiss.
04/24/88	24)	Filed plaintiffs' motion for summary judgment, statement of material facts as to which there is no genuine issue and memorandum in support of plaintiffs' motion for summary judgment and in opposition to defendant's motion for summary judgment.
04/25/88	25)	Filed plaintiffs' notice of filing of exhibits.
04/28/88	26)	Filed plaintiffs' notice of filing of proposed order.
05/04/88	27)	Filed order resetting hearing on motion for summary judgment and to dismiss.
05/16/88	28)	ACCA's motion for an extension of time.
05/16/88	29)	ACCA's motion corrected certificate of service.

05/16/88	30)	Defendant's motion for an enlargement of time and to reschedule date of oral argument.
05/20/88	31)	Filed order granting ACCA's motion for enlargement of time.
05/20/88	32)	Filed order granting defendant's motion for an enlargement of time and to reschedule date of oral argument.
05/26/88	33)	Filed defendant's motion for an enlargement of time and memorandum of points and authorities in support thereof.
05/27/88	34)	Filed defendant's motion for an enlargement of time and memorandum of points and authorities in support thereof.
05/31/88	35)	Filed defendant's opposition to plaintiffs' cross-motion for summary judgment and reply to opposition to defendant's motion for summary judgment.
06/03/88	36)	Filed order granting defendant's motion for an enlargement of time and to extend time to file reply.
06/08/88	37)	ACCA's motion for an enlargement of time.
06/08/88	38)	ACCA's memorandum in opposition to plaintiffs' motion for summary judgment and in reply to plaintiffs' opposition to defendant's motion for summary judgment.
06/13/88	39)	Filed order granting ACCA's motion for enlargement of time.

- 06/16/88 40) Filed plaintiffs' reply memorandum to defendant's opposition to plaintiffs' cross-motion for summary judgment with Rutner declaration.
- 06/16/88 41) Filed plaintiffs' motion for an enlargement of time and memorandum of points and authorities in support thereof.
- 06/16/88 42) Filed plaintiffs' motion to strike declarations, memorandum in support thereof and proposed order.
- 06/24/88 43) Filed defendant's motion for enlargement of time and memorandum of points and authorities in support thereof.
- 06/29/88 44) Filed order granting plaintiffs' motion for an enlargement of time.
- 07/01/88 45) Filed order granting defendant's motion for an enlargement of time.
- 07/11/88 46) Filed defendant's opposition to plaintiffs' motion to strike declarations.
- 10/17/88 47) Filed order entering judgment for the defendant.
- 12/20/88 48) Opinion of Charles R. Richey.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPELLANTS

AMERICAN POSTAL WORKERS
UNION, AFL-CIO, et al.

APPELLEE

UNITED STATES
POSTAL SERVICE

APPEAL NO. 88-5436

DATE	NO.	PROCEEDINGS
12/22/88	49)	Notice of Appeal
01/23/89	50)	Appellants' (American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO) docketing statement and initial submissions
07/17/89	51)	Appellants' Brief
07/26/89	52)	Certified Original Record on Appeal - 2 vol.; 1 vol. of transcript
08/17/89	53)	Appellee's Brief
08/30/89	54)	Appellants' Reply Brief
09/07/89	55)	Joint Appendix
09/19/89	56)	Appellee's Brief
09/19/89	57)	Appellants' Brief
09/19/89	58)	Appellants' Reply Brief
10/13/89	59)	Argued before Chief Judge Wald; Circuit Judges Mikva and Ruth B. Ginsburg
12/8/89	60)	Opinion for the Court filed by Circuit Judge Mikva
12/8/89	61)	Opinion concurring filing by Circuit Judge Ruth B. Ginsburg

- | | | |
|----------|-----|---|
| 12/8/89 | 62) | Judgment by this Court that the Judgment of the District Court appealed herein is remanded in accordance with the opinion of the Court filed herein this date |
| 12/8/89 | 63) | Mandate Order |
| 02/06/90 | 64) | Receive entry of appearance from L. Peter Farkas on behalf of Air Courier Conference of America |
| 03/13/90 | 65) | Notice of filing of petition for writ of certiorari |
| 03/23/90 | 66) | Mandate issued |

The Postal Service recognizes its first priority is to compete on the basis of good service at reasonable price. Yet it also believes that the activities of certain "re-mailing" companies violate the Private Express Statutes. These companies bypass the Postal Service and ship foreign destination letter mail collected from U.S. customers to a foreign point, where the postage of that country is applied and the letter mail then put in the foreign mailstream. The amount of mail lost to the Postal Service, while not quantified, is believed to be very significant. The Postal Service has asked the Justice Department to take action in these cases.

*EXCERPT FROM PAGE 40, OF THE 1985 COMPREHENSIVE STATEMENT ON POSTAL OPERATIONS.

POSTAL SERVICE

39 CFR Parts 310 and 320

Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; Change of Phone Number

AGENCY: Postal Service

ACTION: Correction of Proposed Rule.

SUMMARY: On October 10, 1985, the Postal Service published in the Federal Register (50 FR 62) a proposed modification and clarification of the regulations on the Private Express Statutes. On October 15, 1985, the telephone numbers at Postal Service Headquarters were changed. This document provides the new number for telephone contact concerning the above proposed rule.

DATE: Comments must be received on or before November 12, 1985.

ADDRESS: Written comments should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, D.C. 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 5128, 955 L'Enfant Plaza, SW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2970.

W. Allen Sanders,
Associate General Counsel, Office of General Law and Administration.

[FR Doc. 82-25065 Filed 10-20-85; 8:45 am]

39 CFR Parts 310 and 320

Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; Extension of Comment Period.

AGENCY: Postal Service.

ACTON: Proposed Rule; Extension of comment period.

SUMMARY: On October 10, 1985, the Postal Service published in the Federal Register (50 FR 41462) a proposed modification and clarification of the regulations on the Private Express Statutes, which was corrected in a minor respect on October 22, 1985 (FR 42729).

Several parties have requested that the comment period, originally thirty days, be extended. Because of the substantial public interest in the proposal and the likelihood that a modest extension of the comment period will permit greater public participation in this rulemaking process, the Postal Service is extending the comment period by an additional thirty days. The extended comment period will expire on December 12, 1985.

DATE: Comments must be received on or before December 12, 1985.

ADDRESS: Written comments should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, D.C. 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 5128, 955 L'Enfant Plaza, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2970.

Fred Eggleston,
Assistant General Counsel Legislative Division.

[FR Doc. 85-26742 Filed 11-7-85; 8:45 am]

ACCA
Air Courier Conference of America
 RE: 39 CRR Parts 310 &

October 28, 1985

General Counsel, Law Department
 United States Postal Service
 Washington, D.C. 20260-1113

Dear Sir,

The Air Courier Conference of America (ACCA) is the trade association for the air courier and express industry. Its members are 142 companies who provide domestic and international courier and express services.

ACCA wants to express its opposition to the proposed rulemaking. It is ACCA's position that there should be *no* postal monopoly and all services provided by the Post Office should be subject only to free and open competition in the market place.

The proposed rulemaking purports to attack one group of companies who can provide a less expensive alternative to the post office mailing overseas. ACCA believes that this savings to U.S. companies should not be eliminated but should be commended. This is free enterprise at its best. The more efficient and less costly alternative should be encouraged.

Sincerely yours,

Larry P. Rodberg
 President

United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260

November 20, 1985

Mickey Leland, Chairman
 Frank Horton, Ranking Minority Member
 U.S. House of Representatives
 Committee on Post Office and Civil Service
 Subcommittee on Postal Operations and Services
 209 Cannon House Office Building
 Washington, D.C. 20515

Dear Messrs. Leland and Horton:

Mr. Carlin has asked me to respond to your letter of October 28 expressing interest in the Postal Service's proposed amendment to the regulations implementing the Private Express Statutes and requesting a thirty-day extension of the comment period. As I advised your staff, the comment period for this proposal was extended for thirty days by a notice published in the *Federal Register* on November 8.

You have asked a number of questions about the proposed amendments, which we are happy to answer:

1) Why does the USPS consider the proposed changes in this regulation necessary?

It is needed to prevent the misuse of an administrative suspension of the Statutes, adopted to permit the private carriage of extremely urgent letters, to carry abroad large numbers of letters that are not extremely urgent for delivery as ordinary mail by foreign postal systems. As discussed in greater detail in the published notice, the amendments will make it clear that this

practice, known as "international remailing," is not permitted by that suspension.

2) What action does the USPS intend to take against these remailers if the proposed changes in this regulation become a reality?

The Postal Service expects to act as it does now toward firms that do not comply with the Statutes. We would invite the firms' attention to the Statutes' requirements and request compliance. Our experience has been that most reputable firms will not knowingly violate Federal law. If, however, a carrier, for example, were to persist in its violations, we would expect to renew our request to the Department of Justice to authorize suit to enjoin continuing violations.

3) How much volume is involved in this remailing business, both in terms of pieces of mail and dollars?

The Postal Service has no reliable estimates of either the number of letters or the dollars in revenue that are diverted from the United States Mails by remailing activities. It is common knowledge, however, that a number of shippers and carriers engage in this practice, and we infer from this and other information that the volumes and revenues involved are significant.

4) How would the public benefit from the implementation of the proposed changes in the regulations?

The proposed amendments will reduce the diversion of international letters from the mails. This will benefit the public in a rather direct way by increasing postal revenues and contributing to the Postal Service's efforts to achieve its statutory goal of breaking even financially. They will also maintain the integrity of the Statutes and the implementing regulations by ensuring that a suspension adopted for one purpose is not unfairly used for another purpose.

5) Is the USPS planning any further attempts to reclaim business lost to private couriers?

The Postal Service wishes, of course, to provide the best possible service for all of its customers. We are currently testing a new PRESORT INTERNATIONAL program to provide more direct service for our bulk airmail customers to countries overseas, with resulting savings in delivery time. We are also adjusting the rates of our International Surface Air Lift Service and implementing increased service to Latin America. These actions are separate from and independent of our proposed amendments to the Private Express regulations. Nonetheless they illustrate our commitment to serve the needs of our customers in all of the services we provide.

Sincerely,

William T. Johnstone

Before the
UNITED STATES POSTAL SERVICE

39 CFR Parts 310 and 320:
Restrictions on Private Carriage of Letters;
Proposed Clarification and Modification of Definition
and of Regulations on Extremely Urgent Letters
— 50 FR 41462 (Oct. 10, 1985)

COMMENTS OF THE INTERNATIONAL
REMAIL COMMITTEE
12 DECEMBER 1985

[Excerpts]

Contrary to the Postal Service's expectations, the proposal to eliminate the remailer competition will not significantly enhance net postal revenues. More likely results include the driving of U.S. jobs and printing activities overseas and a loss of revenues now received from inbound international remail. In some cases, U.S. companies will wind up using other, more cumbersome, less efficient remail procedures which are clearly beyond the reach of the monopoly — rather than using still less efficient postal services. Even if the entire \$60 million per year international remail business (estimated gross) were handled by the Postal Service, it may be estimated that the *net increase in annual postal revenues would be no more than three million dollars, about one fortieth of one percent (0.025%) of total postal revenues*, and probably much less. This is obviously an exceedingly small benefit for the costs and injustices imposed.

As international commerce became more and more information oriented, in the late 1970's and early 1980's, customers began to demand the advantages of international remail for other, more time-sensitive bulk mailings, such as newsletters, brochures, statements of account, order forms, etc. Perhaps, a key commercial event was the 39 percent increase in international air mail rates in 1981. In any case, it became clear that by combining prompt air freight service to a carefully chosen foreign postal distribution point with the international air mail postal system, it was possible to extend the remail idea to include air freight/air mail service that was faster, cheaper, and more reliable than the Postal Service's international air mail.

The New Postal Policy Council is a group of about twenty of the largest U.S. banks, securities firms, and public utilities, led by American Express and Citibank. These major institutions (and hence, major mailers) unanimously adopted a resolution strongly supporting private international remail. The Council noted that the proposed rule

could severely impede international trade. [It is] ill conceived, untimely, and unjustified.... American business currently relies on these private carriers whose service has proved to be far superior to that of the United States Postal Service. The effect of the proposed rule would be devastating to American businesses engaged in international trade; it would hamper efforts to improve our balance of payments; and it is not likely to increase U.S. postal revenues in the long run. In short, it benefits no one. [Resolution of November 15, 1985 (emphasis added).]

The International Remail Committee also retained an independent polling firm, Hickman-Maslin, to poll users of remail on the role of remail within their businesses. The survey pool consisted of about 300 remail users, the entire customer base of most of the members of the Committee and, we believe, most of the customers of the industry as a whole (in the short time period in which the poll was planned and executed a few members were unable to assemble customer lists due to illness or travel schedules of key executives). When asked which type of service is most often used for a large international mailing, the companies polled split about equally between the USPS and remail. According to Hickman-Maslin, the group appears to be a reasonable, although not scientific, cross section of U.S. organizations engaged in international commerce; the survey is, however, a scientific sampling of the group polled. In short, while an exhaustive study was impossible in the time frame of the comment period, this poll is an accurate reflection of the opinions of a reasonably representative group of some 300 U.S. organizations engaged in international commerce.

The poll first asked users which service, international remail or the comparable postal service, was better, according to various categories. The results follow. Note that we have inflated the USPS figures by adding in all of the "about the same" answers to give USPS every benefit of the doubt.

	USPS better or about the same	Remail better (much better)
Speed of delivery	23%	55% (49)
Reliability	26%	49% (46)
Keeping cost down	22%	57% (54)
Convenience of use	38%	46% (44)
Value for money	19%	60% (57)
Flexibility in unusual situations	11%	50% (47)

Obviously, a substantial majority of those who had an opinion felt that international remail constitutes a superior method of distributing a large worldwide mailing.

The more pertinent question for the instant rulemaking, however, is not which type of service is better, but whether competition between the two types of services is beneficial to American international commerce. On this issue — which is the issue posed by the proposed rule — the judgment of international businessmen was absolutely clear. *Ninety-nine percent* of the respondents field that alternative international mailing services are important, eighty-one responding "very important." *Ninety-four percent* oppose a postal monopoly on any international shipments. *Sixty percent* believe that restrictions on international remail will "injure the international commerce of the U.S." The entire Hickman-Maslin poll is reproduced as an Appendix to these comments.

* * *

III. INTERNATIONAL REMAIL DOES NOT DEPRIVE THE POSTAL SERVICE OF SIGNIFICANT NET REVENUE.

The preamble to the proposed rule states that remail is "depriving the Postal Service of revenues in a manner not intended." 44 FR 41462. Although it is the only justification of the proposed rule that even hints at public policy, this conclusory statement is nowhere supported by evidence. Clearly, "more postal revenue," standing alone, is hardly a complete statement of the postal policy of the United States (see next section). In the instant rulemaking, the presumption of significant additional net revenue is not even factually correct, as explained in the following analysis.

The remail industry, we estimate, will gross about \$60 million in 1985, not counting traffic in books and magazines (this is a very rough guess). Of this amount, more than half derives from the handling of printed matter; the remainder, perhaps \$25 million, involves the remail of "first class" items. We shall discuss the effect of the proposed rule on each type of document traffic, and then address the negative revenue effects of foreign retaliation against the Postal Service.

* * *

B. The proposed rule is not supported by the traditional public policy principles supporting the postal monopoly.

More generally, we may look behind the principle established by the urgent letter exception to the traditional policy principles which underpin the postal monopoly. The sound development of the monopoly law depends upon constant referral to the principles which justify the monopoly in the first place.

The most authoritative statement of these principles is the 1973 Board of Governors' report to Congress, *The Private*

Express Statutes and Their Administration. In this report, the Governors begin by noting the statutory mission of the Postal Service to "bind the Nation together" and "provide prompt, reliable, and efficient service to patrons in all areas." Page 4, citing 39 U.S.C. 101(a). The report notes the duty to provide for letters sealed against inspection at a postage rate "uniform throughout the United States." *Id.*, citing 39 U.S.C. 3623(d). From these statutory duties, the report reasons:

A prohibition on rates varying with distance creates competitive opportunities for skimming the creams of those postal operations that are most attractive from a business standpoint. *It would make little sense to allow letter mail competition without simultaneously authorizing variable rates on letters so that the Postal Service may compete equitably in the marketplace.* But uniform nationwide rates for letter mail should not be lightly discarded. Rates varying with distance would be complicated and confusing for many citizens, would point to increases in regulatory red tape, and could lead to untoward political pressures for changes in zone limits and the like.

The law requires that the Postal Service serve all the nation [quoting 39 U.S.C. 101(b)]. This is a key requirement—perhaps *the* key requirement—if the Postal Service is to discharge its basic function to "provide prompt, reliable, and efficient service to patrons in all areas ... and render postal service to all communities." *This means that the Postal Service must serve those areas and customers for which operating costs are not recoverable under a uniform pricing policy. If the Private Express Statutes were repealed, private enterprise, unlike the Postal Service, would be free to move into the*

most economically attractive markets while avoiding markets that are less attractive from a business standpoint.

....Without abandoning the policy of self-sufficiency and re-introducing massive subsidies, it is hard to see how the Postal Service could meet rate and service objectives in the face of cream-skimming competition against its major product. But abandonment of this policy would impose an unjustifiable burden of costs on the tax-paying public and might lead to the erosion of universal postal service.

We believe that the uniform rate and nationwide service requirements are sound.... Accordingly, the service and financial policies that are rightly embodied in the Postal Reorganization Act require the restrictions on private letter-mail carriage be maintained. [Pages 5-7 (emphasis added).]

The Governors' report goes on to cite other, secondary reasons for the postal monopoly including the need to finance the postal inspection service, which insures the safety of the mails and protects the public from undesirable mail matter. Page 7. The report further notes that without a monopoly "international mail reciprocity agreements would also suffer ... Foreign governments would have the problem of whether to deal with several, rather than one, originating mail suppliers. The Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail." Page 8.

Reasonable men can, and have, disagreed with some of these principles of postal policy, but that debate is beyond the scope of the current rulemaking. An important and valid ques-

tion, however, is whether the proposed rule is reasonable related from these traditional principles. We submit that it is not.

Clearly, the proposed ban on international remail has no logical relationship with the Postal Service's ability to "bind the Nation together" through universal postal service at a uniform price. "Binding the nation" refers to domestic service; international postal service can hardly claim to partake of the same special importance to the nation. The need to maintain uniform first class mail rates is irrelevant to international remail. There is no international equivalent to the uniform rate rule. On the contrary, the Postal Service adjusts its rates, especially its ISAL rates, market by market depending upon demand and can very well "compete equitable in the marketplace."

Nor is there any international equivalent to the duty to serve small towns at a loss. The Postal Service is "free to move into the most economically attractive markets while avoiding markets that are less attractive from a business standpoint." It has done so, offering ISAL, Presort International, and International Express Mail service only in certain cities in the United States and only to certain destinations overseas. More generally, the Postal Service's costs for international service are more or less unaffected by the remoteness of any given city. Service to the farthest corner of Scotland costs the Postal Service the same as service to downtown London. The Postal Service just puts the mail on the airplane to London and lets the British Post Office deliver it.

Of course, the Postal Service can, and has, noted that a monopoly on international remail would generate additional revenues to pay for losses incurred in providing domestic service to remote cities in the United States. But this argument would justify the monopolization of any activity, for example, the telecommunications business (as indeed it has, in other countries). Under traditional American principles, however, the scope of a monopoly should be reasonably related to the activity

which generates losses, as the rationale articulated in the Board of Governors' report does.

It is clear, then, that the fundamental postal policy bases for the postal monopoly — universal service and a uniform first class mail rate — do not reasonably support a monopoly over international remail.

The Governors' report does on to mention two secondary bases for the monopoly: the need to support the postal inspectors program and certain international mail requirements. Obviously, the need to pay for postal inspectors is only tangentially related to international remail. It is doubtful that the inspection service is much concerned with what is mailed out of the U.S., and the Customs Service is the primary guardian against incoming contraband. Hence, the inspection service does not provide a rational basis for monopoly over international remail.

The matter of international postal agreements is more complicated. The Governors' report argues that "Foreign governments would have the problem of whether to deal with several, rather than one, originating mail suppliers." This is not a problem with the remail industry. The only post office that must deal with the remail company is one that is doing so voluntarily and at a profit. The Governor's report goes on to note that "the Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail." The Postal Service, of course, would be obliged to deliver incoming mail, an activity for which it is compensated by the foreign post offices according to the internationally agreed "terminal dues" standard. Since the basic infrastructure of the Postal Service is paid for by the domestic postal service, it appears probable that "terminal dues" compensate the Postal Service for the marginal costs of delivering incoming mail. In any case, the Postal Service benefits from a low terminal dues rate — and has fought for one over the years — because it exports more mail than it

imports. Even if it did not, surely the solution is for the Postal Service to negotiate higher terminal dues, rather than imposing a restrictive monopoly on outgoing American mail in order to pay for below cost delivery of foreigners' inbound mail.

Nor does a vague allusion to "international agreements" provide an independent policy basis. If not grounded in an identifiable American public interest, the international agreement becomes no more than a self-serving market sharing agreement between post offices. The Postal Service would have no excuse for entering into such an agreement.

In short, the traditional rationales for the postal monopoly do not provide a sound basis for extending the monopoly to include the air freighting of bulk international mailings.

* * *

Respectfully submitted,

James I. Campbell, Jr.
Attorney for the Committee on
International Remail

Washington, D.C.
12 December 1985

BY HAND

General Counsel
Law Department
U.S. Postal Service
955 L'Enfant Plaza
Room 5128
Washington, D.C. 20260-1113

Re: Restrictions on Private Carriage of Letters;
Proposed Clarification and Modification of
Definition and of Regulations on Extremely
Urgent Letters

Dear Sir:

In accordance with the Notice of Proposed Rulemaking, 50 Fed. Reg. 41,462 (October 10, 1985), I enclose the original and one copy of the Comments of the United States Department of Justice in the above-captioned proceeding.

Sincerely,

Martin L. Stern
Attorney
Antitrust Division

Enclosures

Before the
UNITED STATES POSTAL SERVICE
Washington, D.C. 20260-1113

IN THE MATTER OF:
Restrictions on Private Carriage of Letters; Proposed
Clarification and Modification of Definition and of
Regulations on Extremely Urgent Letters

COMMENTS OF THE UNITED
DEPARTMENT OF JUSTICE

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December 12, 1985

Before the
UNITED STATES POSTAL SERVICE
Washington, D.C. 20260-1113

IN THE MATTER OF:
Restrictions on Private Carriage of Letters; Proposed
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COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE

I. INTRODUCTION AND STATEMENT
OF POSITION

By Notice of Proposed Rulemaking ("Notice")¹ the United States Postal Service has solicited comments on proposed revisions of its regulations governing the private carriage of "extremely urgent" domestic and international mail.

According to the Notice, private carriers, commonly known as "remailers," are diverting revenue from the Postal Service by taking advantage of current Postal Service regulations that allow the private carriage of "extremely urgent" mail. Relying on ambiguities in the regulations, these remailers ship a large number of arguably non-urgent international letters from the United States and deposit them in foreign mailstreams for delivery to separate ultimate addressees. Typically, a remailer collects mail from customers at different locations in the United States, bundles it, and ships it from one domestic point to a single destination overseas. When the mail arrives overseas, the remailer or its agent deposits the mail in a foreign mail system for delivery in that or other countries, often at relatively low foreign postal rates.²

¹ 50 Fed. Reg. 41,462 (October 10, 1985) ("Notice").

² See *infra* discussion at 5. The Notice neither identifies the specific carriers engaging in remailing, indicates the customers served, nor provide

The Postal Service maintains that such private carriage as currently conducted is not permitted by its current regulations suspending application of the Private Express Statutes for extremely urgent letters. The Postal Service proposes to amend the regulations to "leave no room for question as to the circumstances" under which private carriage of international mail is permitted.³ Apparently, once the regulations are clarified, the Postal Service intends to ask the Department of Justice for authority to enjoin remailers from violating the Private Express Statutes.⁴

The Department of Justice, the Executive Branch agency responsible for the enforcement of the antitrust laws and the promotion of competition, submits that the changes proposed by the Postal Service would strifle the thriving, competitive market that has developed for the carriage of international mail. We believe that there is some question as to whether the Postal Service possesses the legal authority to extend its domestic monopoly into international carriage in the manner proposed. Questions of legal power aside, it appears certain that the Postal Service's proposal would reduce or eliminate competition in the international postal market to the detriment of American citizens and businesses competing abroad.

As the Postal Service acknowledges, any ability to inhibit competition from remailers stems solely from its authority to prohibit private carriers from transporting letters over the

any estimate of revenue received for those services. An industry journal, however, suggests that the practice is widespread and notes that a list "of couriers and corporations that are engaged in remail, . . . is almost a 'Who's Who' of American business." *Business Mailers Review*, January 7, 1985.

³ 50 Fed. Reg. at 41,462.

⁴ L. Cox, Remarks at Meeting of the Board of Governors, United States Postal Service 50 (September 6, 1985).

domestic portion of an international journey.⁵ Though the Postal Service has historically asserted that its monopoly extends to international mail, its opinions indicate no specific statutory authority other than the prohibition on private domestic carriage. Moreover, the Postal Service claims that its international classifications and rates are not subject to review by the Postal Rate Commission. We suggest that the Postal Service cannot have it both ways. It cannot assert a monopoly of international mail as a necessary adjunct to its domestic statutory monopoly, *i.e.*, when it wants to increase its revenue, and at the same time claim that its international rates are free from the statutory review provided to check its domestic monopoly power. In sum, we believe that the statute itself, as well as the legislative history is ambiguous on the precise geographic scope of the Postal Service's monopoly. We, therefore, urge the Postal Service to seek clarification from Congress, instead of *sua sponte* promulgating regulations that would stifle competition from the private sector that is providing substantial benefits to many American citizens and businesses.

Our concern over the Postal Service's proposal stems from general economic policy considerations as well as from the desire to preserve the benefits currently enjoyed by the remailers' customers. The United States follows a general economic policy of fostering competition as a means of promoting efficiency and consumer welfare. Congress provided for a domestic postal monopoly because it feared that reliance on competition would not have guaranteed universal service at affordable rates. Whatever the current validity of these concerns, the fact that government monopoly services are inherently less efficient than competitive services dictates that consumer welfare will be enhanced if the postal monopoly is construed no more broadly than necessary to attain the goal of universal

⁵ "The Private Express Statutes have been consistently applied to the domestic segment of international shipments." 50 Fed. Reg. at 41,462 (emphasis added).

service. The Postal Service has adduced no evidence that continuation of international mail carriage by private firms would undermine that goal. As a consequence, it has failed to justify the significant consumer welfare loss threatened by its proposed prohibition of competitive services.

II. BACKGROUND

A. The International Postal Market

American firms use remailers to send bulk mailings to foreign addressees. These bulk mailings typically involve such items as bank statements, periodicals, catalogues, and advertisements, but rarely individual correspondence. Generally, the remailer ships the mail to the foreign postal administration that offers the best combination of speed and price for delivery to the addressee. The postal administration in which the remailer deposits the mail is not necessarily that of the ultimate recipient.

Some foreign postal administrations have sought business by encouraging remailers to post bulk mailings in their countries at relatively low Surface Airlift ("SAL") rates.⁶ Surface Airlift programs compete with one another for the patronage of remailers who are willing to introduce mail into the international mail system anywhere in the world.

According to industry officials, when begun several years ago, the SAL programs of foreign postal administrations captured most of the business of forwarding bulk mail originating

⁶ It is our understanding that SAL rates are low because it is relatively inexpensive to ship international bulk mail. A postal administration that accepts bagged and sorted mail for delivery to other countries essentially acts as a freight forwarder. The administration ships the mail to the destination country by air and pays the postal administration of that country a fee called "terminal dues" to deliver the mail to the ultimate addressees. Terminal dues are set by the Universal Postal Union, a United Nations affiliate that regulates the postal relationships of member countries. Terminal dues are calculated on a per pound rate basis on the net imbalance in mail sent between two member countries.

in the United States. In response, the Postal Service instituted its own SAL service called International Surface Airlift ("I-SAL"). According to a Postal Service report, I-SAL has recently shown a sharp decline in volume, largely because it has not met the needs of American mailers who have been able to rely on "the heavy competition in the international carriage of bulk printed items."⁷ The ability of I-SAL to compete is further hampered because it fails to provide users the efficiency offered by private remailers. To be specific, an I-SAL customer must deliver mail that is sorted and bagged by country of destination to an international airport. In contrast, a remailer will pick up mail at a customer's place of business, sort it and bag it by country, and arrange for delivery through a foreign postal service's SAL, typically at a price below the I-SAL rate. Moreover, because remailers ship mail overseas on more flights per week than I-SAL, they offer more timely service. Finally, remailers typically offer service to more countries than I-SAL.⁸

B. The Current Statutory and Regulatory Scheme

The Postal Service currently enjoys a statutory monopoly over the domestic carriage of letters.⁹ There are statutory exceptions, however, that permit non-Postal Service carriage of

⁷ See U.S. Postal Service, *International Mail — An Overview* 16-17 (1985) (submitted to USPS Board of Governors, September 6, 1985) ("International Mail").

⁸ *Id.* at 13, 16-17. The Postal Service is introducing a "Presort Airmail" test program that is designed to provide service comparable to that of the private remailers. Under the proposed service, mailers will sort their mail by country. The Postal Service will collect the mail and ship it overseas the same or following day. Service will be available to all countries of the world. *Id.* at 15-16.

⁹ The Private Express Statutes prohibit, with certain exceptions, the establishment of a "private express for the conveyance of letters or packets . . . over any post route . . . or from any city, or town, or place to any city, town, or place, between which the mail is regularly carried. . . ." 18 U.S.C.

letters.¹⁰ Under 39 U.S.C. § 601(b), the Postal Service has exercised the power to suspend the Private Express monopoly where "the public interest" so requires.

In 1979, the Postal Service suspended the Private Express Statutes for the delivery of "extremely urgent letters." 44 Fed. Reg. 61,181, condified at 39 C.F.R. § 320.6. Under current regulations, a letter is considered extremely urgent if it meets either of two tests:

- (1) the "loss of value" test, which requires that the letter must be delivered within a specified time and that its usefulness would be greatly reduced if it were not delivered within that time,¹¹ or

§ 1696. The carriage of letters by anyone "having charge or control of any conveyance operating by land, air or water . . . otherwise than in the mail" is similarly prohibited. 18 U.S.C. § 1694. The Postal Service has used its rulemaking authority to define "letters" broadly. See *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824 (D.C. Cir. 1979). See also 39 C.F.R. § 31C.1

¹⁰ For example, a letter "may be carried out of the mails" so long as the Postal Service receives the remuneration it would have received if the letter "had been sent by mail." 39 U.S.C. § 601(a).

¹¹ In pertinent part, 39 C.F.R. § 320.6(b) provides:

(1) For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be complete within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits. . . .

(2) Letters sent from the 48 contiguous states of the United States or to other nations are deemed "delivered" when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states. (Emphasis added)

- (2) the "cost" test, which requires that the sender demonstrate the urgency of the letter by paying a substantial premium over regular postal rates.¹²

Under the "cost" test, Postal Service regulations allow carriers to make the comparison with Postal Service rates based on an entire shipment of letters if all the letters are "delivered" to the same destination:

If a single shipment consists of a number of letters that are picked up together and *delivered together to a single destination*, the applicable U.S. postage may be computed for purposes of this paragraph as though the shipment constituted a single letter of the weight of the shipment. (Emphasis added)

39 C.F.R. § 320.6(c). The definition of "delivered" is the crux of the ambiguity that has permitted remailers to flourish by using airmail shipments as "urgent" deliveries of arguably "non-urgent" individual letter items.

For purposes of the suspension of the Private Express Statutes for extremely urgent international mail, the regulations consider letters to be "'delivered' when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states." 39 C.F.R. § 320.6(b)(2). The remailers contend that under the current regulations, even though mail is ultimately destined for a number of different foreign addressees, it is deemed "delivered" when the bundle of consolidated letters arrives at the overseas carrier. Under that reading of the regulations, shipments so delivered meet the cost test if the carrier charges twice the

¹² In pertinent part, 39 C.F.R. § 320.6(c) provides:

It will be conclusively presumed that a letter is extremely urgent and is covered by the suspension if the amount paid for private carriage of the letter is at least three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is the greater.

domestic First Class rate based on the aggregate weight of each shipment. By treating the consolidated package as a single letter whose postage is determined by the weight of the entire package, remailers can satisfy the cost test and charge a lower rate than if the postage payable were calculated separately for each piece of mail in the package addressed to a different addressee.¹³ The Postal Service argues that this practice of the remailers is inconsistent with both the intent and terms of the suspension for extremely urgent mail and proposes revising the regulations to make it clear that the carriers' current practices are prohibited by the Private Express Statutes. Notice, 50 Fed. Reg. at 41,462.

C. Summary of Proposed Regulations

The Postal Service proposes three changes in its regulations to reduce ambiguity in the definition of extremely urgent mail. The first amendment construes the Postal Service monopoly over letter carriage to include international mail by providing "explicit notice that carriage of letters over post routes within the United States in the course of shipment to or from another country, as well as carriage that begins and ends within the United States" is governed by the statutes. 50 Fed. Reg. at 41,462. This change is made by inserting the term "within the United States" to the existing provision of 39 C.F.R. § 310.1(d).¹⁴

The second change alters the definition of extremely urgent international mail. The proposed regulations would eliminate application of the "loss of value" test to international mail, by

¹³ 50 Fed. Reg. at 41,463 ("... postage for first class mail is based on one-ounce increments of weight. Few letters weigh exactly one ounce, and if several are weighed together the total will be fewer ounces than the sum of the individual letters counted as one each ... [thus] reducing the amount that the carrier must charge to satisfy the twice-the-postage element of the test.").

¹⁴ Section 310.1(d), as modified, would state: "Post routes are routes on which mail is carried by the Postal Service *within the United States*. ..." 50 Fed. Reg. at 41,464 (emphasis on proposed change).

deleting the "delivered" language of 39 C.F.R. § 320.6(b).¹⁵ International letters would be considered "extremely urgent" only if the price charged were great enough to meet the "cost" test.¹⁶

The third revision would restrict application of the cost test by clarifying the definition of "destination." The new regulation would define "destination" as the ultimate addressee of an individual letter, rather than the international carrier that receives the bundle of letters. As a result of this proposed change, a carrier would not be able to calculate the minimum charge for an entire shipment of letters but would be required to calculate the charge for each piece sent to a different addressee. This change is intended to eliminate or significantly to lessen the private carriage of international mail by raising the minimum price that a private carrier must charge to qualify under the "cost" test.¹⁷

III. DISCUSSION

A. It is Not Clear that Congress Intended to Grant the Postal Service a Monopoly over International Mail

A number of factors raise doubt as to whether Congress intended to extend the Postal Service monopoly to international mail. In the first instance, the plain language of the Private Express Statutes grants the Postal Service a monopoly over domestic carriage.¹⁸ With respect to an international monopoly, the statutes are silent. Given the national economic policy of fostering competition, the courts will require a clear expression

¹⁵ See *supra* note 11.

¹⁶ 50 Fed. Reg. at 41,463-64.

¹⁷ *Id.*

¹⁸ The Postal Service has relied on the prohibition against private carriage of letters over domestic routes to claim a similar monopoly over mail sent abroad. See, e.g., Op. Gen. Counsel Postal Serv. PES 83-3 (1983) ("[T]he Private Express Statutes apply to those portions of 'air routes in operation'

of a congressional intent to create a monopoly, or otherwise restrict competition.¹⁹ Unless, it were necessary to give the Postal Service a monopoly over international mail in order to effectuate some domestic policy goal, like "universal service," the courts would not impute to Congress an intent to create a monopoly over international mail. As we indicate in Section B.2, *infra*, there is no evidence that granting the Postal Service a monopoly over international mail is necessary in order to provide domestic universal service or any other domestic goal of Congress.

which are partially as well as wholly within the United States. Therefore, the Private Express Statutes and regulations are applicable to the carriage of letters which are sent from the United States to other countries. . . .").

We are, of course, aware that courts "give great deference to the interpretation given a statute by the agency charged with its administration." *National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, 595 n.110 (D.C. Cir. 1979) ("*NAGCP I*"), *rev'd on other grounds*, 103 S.Ct. 2717 (1983). On the other hand, courts have reversed an administrative agency's construction of its statute as impermissible where it is not "sufficiently reasonable." See *FAIC Securities, Inc. v. United States*, No. 84-5408, slip op. at 16 (D.C. Cir. 1985). Indeed, courts have reversed the Postal Service's construction of the Postal Reorganization Act on several occasions. See, e.g., *Time, Inc. v. United States Postal Service*, 685 F.2d 760, 771 (2d Cir. 1982) (Postal Service construction rejected as simplistic and inconsistent with structure of Act); *NAGCP I*, *supra*, at 595-598 (Postal Service construction found too "curious" and "narrow" to prevail over common sense reading of Act); *United Parcel Service v. United States Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

¹⁹ See, e.g., *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) (exemptions from antitrust laws strictly construed); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) ("[C]ourts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) (immunity from antitrust laws is not lightly implied); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51, (1963) (repeals of antitrust laws by implications from regulatory statute strongly disfavored and found only where plain repugnan-

The different rate regulatory mechanisms that Congress has established for domestic and foreign mail also support the view that Congress did not intend to confer on the Postal Service a monopoly over international mail. In enacting the Postal Reorganization Act, Congress established a complex regulatory scheme which the Governors of the Postal Service manage its affairs while the independent Postal Rate Commission reviews and recommends postal service classifications and rates.²⁰ The Governors may establish postal rates only after the Postal Rate Commission reviews a rate request submitted by the Postal Service.²¹

cy exists between antitrust and regulatory provisions); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (*per se* violation of antitrust laws not exempt where statute gave defendant duty of self-regulation, but regulation by SEC not sufficiently pervasive); *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959) (anticompetitive conduct not exempt from antitrust laws where regulatory scheme not sufficiently pervasive); *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971) ("Our antitrust laws constitute our economic magna carta, designed to protect against predatory oppression. Conceived as such a writ they must not be facilely negated.").

²⁰ See *Governors of the United States Postal Service v. United States Postal Rate Comm'n*, 654 F.2d 108, 114 (D.C. Cir. 1981); *United Parcel Service v. United States Postal Service*, 604 F.2d 1370, 1373 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). See generally 39 U.S.C. §§ 3601-3628; House Comm. on Post Office and Civil Service Commission, H.R. Rep. No. 91-1363, 91st Cong. 2nd Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 3649, 3658-3660, 3663-3669 ("House Report").

²¹ The Commission, typically after a hearing on the record, transmits a recommended decision to the Governors on changes in postal rates based on specifically enumerated statutory considerations. These criteria include the following:

(1) the establishment of a fair and equitable schedule;

(4) the effect of rate increases upon . . . business, mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

In enacting this "carefully constructed system of checks and balances between governmental agencies,"²² the courts have reasoned that "Congress intended to prevent undue imposition on users of monopolized classes. . . ."²³ The legislative history graphically demonstrates the Congressional concern that, in the absence of oversight by the Postal Rate Commission, the Postal Service could abuse its monopoly over First Class mail:

The temptation to resolve the financial problems of the Post Office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing that imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.²⁴

Congress did not express a similar concern for regulating the rates charged by the Postal Service for international mail. Indeed, the Postal Service interprets the Postal Reorganization Act as not providing any Postal Rate Commission jurisdiction over international service classifications and rates.²⁵

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs.

39 U.S.C. § 3622(b). The Act also places strict procedural restrictions on the Governors' authority to establish a rates different from those recommended by the Commission. See 39 U.S.C. § 3625.

²² *Governors v. Postal Rate Comm'n*, 654 F.2d at 116.

²³ *National Association of Greeting Card Publishers v. United States Postal Service*, 103 S.Ct. 2717, 2730, n.10 (1983).

²⁴ S. Rep. No. 91-912, 91st Cong., 2d Sess. at 13 (1970).

²⁵ See *International Mail*, *supra*, at 8. Compare 39 U.S.C. § 407 with 39 U.S.C. § 3622. Pursuant to its authority under Section 407 to conclude international Universal Postal Union, an organization of foreign postal

The freedom Congress allowed the Postal Service in setting international rates is inconsistent with the view that Congress intended to confer monopoly status on the Postal Service with respect to international mail. In establishing domestic rate regulatory authority in the independent Postal Rate Commission, Congress expressed a policy choice to protect users of the Postal Service from unfettered pricing by a lawful monopolist.²⁶ There is neither evidence nor reason to believe that Congress would have been less solicitous of U.S. users of international mail if it had intended to confer a Postal Service monopoly over international mail. In fact, we are unaware of any situation in which Congress has created a legal monopoly without providing for rate regulation to protect the public from abuse of the monopoly power. In this case, the Postal Service cannot assert, as a necessary adjunct to its domestic monopoly and in order to raise revenue, that its international services are to be free from both the rigors of the market place and regulation by the Postal Rate Commission. Courts simply would not be likely to ascribe such an unprecedented approach to Congress.

In sum, we believe that the scope of the Postal Service monopoly is sufficiently unclear to call into question the Postal Service's authority to adopt the proposed regulations. We recognize the temptation faced by the Postal Service to assert the authority to construe broadly the scope of its monopoly and thereby protect itself from revenue loss, irrespective of the size or import of such loss. Where, however, the underlying

monopolies that, *inter alia*, establishes the "base" rate for various weight categories of international mail. See generally Article 19, Universal Postal Convention, October 26, 1979, T.I.A.S. No. 9972 ("1979 Convention"). This base rate, as a practical matter, places virtually no restriction on the Postal Service, since UPU members may set the actual charge for international mail originating in their own countries anywhere from 70 percent below to 100 percent above the base rate. *Id.* Member countries are also authorized to add additional surcharges for conveyance by air. *Id.* at Arts. 69, 70.

²⁶ See note 24, *supra*.

statutory authority is as "obscure" as it is here, and a broadened monopoly would adversely effect consumer interests, Congress, not the Postal Service is the appropriate body to determine the scope of the Postal Service's monopoly and authority.²⁷

B. The Public Interest Would Best be Served by Permitting Competition from International Remailers

1. Competition from the Private Sector Will Benefit Consumers of International Postal Service

The Postal Service, like any monopolist, has the ability and incentive to charge supracompetitive rates for its monopoly services. As discussed above, there are apparently no effective regulatory restraints being imposed on Postal Service classifications and rates for international mail. Entry by remailers has provided the only incentive for the Postal Service to price its international services competitively. In response to entry by remailers, moreover, the Postal Service is now also in competition with other postal administrations.²⁸

²⁷ See *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d at 827, n.10. The dissenting judge, with whom the majority agreed concerning the importance of Congressional attention to ambiguities in the scope of the postal monopoly, opined:

[T]he desired scope of the Postal Service's monopoly is entirely a question of public policy, properly to be determined solely by Congress, and this court should not countenance the Postal Service's power and revenue grabbing simply because the statute, the statutory history, and the agency's own administrative interpretations are conflicting and obscure.

Id. at 831 (Judge Wilkey, dissenting).

²⁸ Mail may pass through a number of different countries on its way to the ultimate addressee. Countries through which the mail passes on part of the journey are compensated through the payment of "transmit fees" by the originating country. The postal administration that delivers the letter to the ultimate addressee is compensated by the payment of "terminal dues." The

Consumers of international postal services have benefited greatly from the competition provided by private international carriers. Competition in this market has provided consumers with several significant benefits. It has placed downward pressure on price, and provided a strong incentive for firms to provide efficient and innovative service. A derivative benefit is that businesses using lower-cost, more efficient international postal competitors can use these benefits to become more effective competitors themselves in international markets.

Apparently, private firms doing business abroad have not been satisfied with the international service provided by the Postal Service. A group of First Class mailers recently wrote to the Postal Service that the ability of their firms to compete with foreign companies is hurt by the "unreliable and at times erratic nature of delivery for international mail. . . . This jeopardizes business opportunities for American companies trying to sell goods and services abroad."²⁹ Indeed, Postal Service officials

Postal Service reported that in 1984 transit revenue accounted for approximately 13.6 percent of total revenue from international mail. Programs such as SAL and I-SAL can be profitable because a postal administration earns the difference between its rates and the various incidental charges such as terminal due and transit fees. Remailers have forced postal administrations to compete with one another by lowering rates and improving service in an effort to attract this lucrative remail business.

The Universal Postal Union ("UPU"), in response to this competition, has instituted regulations that can be viewed as an attempt to enforce an international postal cartel. The foundation supporting the UPU is the agreement of its members to allow "freedom of transit" for mail originating in other countries. Article 1, 1979 Convention. Under Article 23.4 of the Convention, however, members may refuse transit of mail originating in a member country but posted abroad. The Department has been made aware of a number of instances where the Postal Service has relied on Article 23 in delaying passage of mail originated by U.S. companies that was posted in foreign countries by remailers.

²⁹ Letter from Laurel Kamen (American Express Corp.), Richard Coughenour (Citicorp) and Rolf Wetjen (Shearson American Express Corp.)

have acknowledged that the Postal Service's performance in international mail has been inadequate. For example, Walter Duka, Assistant Postmaster General for International Postal Affairs, stated at a recent meeting of the Board of Governors that the Postal Service has taken a number of measures to "try and get international mail back on a healthy track," and noted that the purpose of these measures is to "match the delivery claims made by the so-called remailing companies."³⁰ Indeed, the Postal Service did not even offer I-SAL service until it began to lose substantial amounts of international business. According to Mr. Duka:

[I]nternational mail operates in a very competitive environment. We certainly realize that we've experienced significant volume losses and that we must make our offerings more competitive.³¹

The difference in price between services provided by the Postal Service and those of remailers is quite substantial. According to recent reports, some remailers charge as much as 35 percent less than the Postal Service and provide better service. As a result, private carriers have taken "nearly all of the international market for airlifted printed matter."³²

Competition from remailers also has the salutary effect of providing additional incentives for the Postal Service to provide innovative service and to increase operating efficiencies. Mr.

to Postmaster General Pual N. Carlin, quoted in "Erratic Service Hurting International Firms," *Business Mailers Review*, May 27, 1985.

³⁰ W. Duka, Remarks at Meeting of the Board of Governors, United States Postal Service 47 (September 6, 1985) ("Duka Remarks").

³¹ *Id.* at 48. See also "Price Cutting Looms for International Mail," *Business Mailers Review*, Sept. 9, 1985; "Faster Foreign Mail Service Promised," *Business Mailers Review*, June 24, 1985; "A Response to Competition in Foreign Mail," *Business Mailers Review*, July 22, 1985.

³² See "Price Cutting Looms for International Mail," *Business Mailers Review*, Sept. 9, 1985.

Duka's response to a question by Governor Voss leaves little doubt that remailers provide an important competitive check on the exercise of market power by the Postal Service over international mail services.

[W]e are coming too late, I think, to try to apply some imagination and creativity and try to be more competitive with these private firms and I certainly agree with you that we should have been out ahead of them in providing better service before *they in effect have forced us to do this*.³³

2. There is No Evidence that the Policies Underlying the Domestic Postal Monopoly Will be Jeopardized by International Remail Competition

A significant Congressional policy underlying the Postal Reorganization Act is that of "universal service":

The Postal Service is required to develop and provide adequate and efficient postal service at fair and reasonable rates and to serve as nearly as practicable the entire population of the United States. . . . [E]ffective postal service is to be assured to residents of rural, as well as urban, communities.³⁴

It has been argued that the domestic monopoly created by the Private Express Statutes is necessary in order to support this universal service policy, i.e., that unless private entrepreneurs are prevented from "cream skimming" the more lucrative, high density markets, the cost of providing postal services to all users will effectively deny service to some users.

³³ Duka Remarks at 52 (emphasis added).

³⁴ See House Report, *supra*, 1970 U.S. Code Cong. Ad. News at 3657 (1970).

In general, we believe that these arguments are unsound as a matter of economic policy and do not justify the Private Express Statutes. Rather, it has been our position that the Private Express Statutes represent a historic deviation from this nation's traditional reliance on the private sector, rather than on the government, to provide services that the public demands. We have observed elsewhere that the Postal Service's domestic monopoly, coupled with the uniform rate structure mandated by the Postal Reorganization Act, "may impede or preclude some transactions that are cost justified and at the same time encourage other transactions involving the mail for which equally good or better lower cost substitutes are available."³⁵

Assuming, nonetheless, that a connection can be made between universal service and a statutory domestic monopoly, we do not believe that curtailing competition from international remailers is necessary to further the policies underlying the Private Express Statutes. The Postal Service, noting that the Private Express Statutes are "a revenue protection measure,"

³⁵ Testimony of Assistant Attorney General William F. Baxter before the Subcommittee on Governmental Information, Justice and Agriculture of the House Committee on Government Operations at 8 (May 4, 1983). See generally, U.S. Department of Justice, "Changing the Private Express Laws: Competitive Alternatives and the U.S. Postal Service" (January 1977).

While it may be true that a single postal firm might serve certain rural low density markets most efficiently, the market for inter-city delivery of mail appears to be capable of serving a number of competing firms. The result, under the Private Express Statutes is that low-cost users of the mail subsidize high-cost users. Rather than the hidden subsidy engendered by the present scheme, Congress might explicitly subsidize these high-cost users. From all indications, international mail, like inter-city mail, is not a natural monopoly. Thus, a number of firms competing with each other could most efficiently provide international postal services, and avoid the inefficiencies associated with a system of hidden subsidies. Similarly, a direct subsidy to high-cost users would address more efficiently any concern that such competition would undermine universal service by denying local delivery a subsidy from international postal services.

argues that the private carriage of international mail "altogether bypasses the United States Mails."³⁶ It provides no evidence, however, that would indicate that competition from international carriers is causing it economic harm, let alone such great harm as to jeopardize its ability to provide universal service.

In an analogous situation, this Administration recently authorized, and the Federal Communications Commission approved, limited competition to the INTELSAT international satellite monopoly³⁷ in the form of customized business services roughly analogous to the customized mail services provided by remailers. The decision was based on the conclusion that the benefits of competition in the provision of specialized telecommunication services outweighed any risk to universal service. Under circumstances similar to those present here, the Administration determined that entry by U.S. firms would give customers of satellite services "new service options

³⁶ Notice, 50 Fed. Reg. at 41,462.

³⁷ INTELSAT is an acronym for the International Telecommunications Satellite Organization, a multinational organization that owns and manages the global public telecommunications satellite system. According to a recent report, INTELSAT "handles about 2/3 of the world's transoceanic telecommunications traffic and most international television transmissions." See Senior Interagency Group on International Communications and Information Policy, "A White Paper on New International Satellite Systems" at 7 (Feb. 1985) ("White Paper"). Under the Satellite Act of 1962, the President must determine the international satellite systems "separate" from INTELSAT are "required in the national interest" before the FCC may authorize such systems under the Communications Act of 1934. See 47 U.S.C. § 721(a)(6). Under the multilateral treaty covering INTELSAT, signatories may authorize private satellite facilities for "international public telecommunications service requirements" where those facilities are coordinated with INTELSAT to ensure technical compatibility and the avoidance of economic harm to INTELSAT. See INTELSAT Intergovernmental Agreement, Article XIV, Aug. 20, 1971, 23 U.S.T. 3813, 3853, TIAS No. 7532. See generally FCC Report and Order in Docket No. 84-1299 at 45 (Sept. 3, 1985.).

and benefits of competition."³⁸ The Administration also contemplated that competition would engender responsive innovation by INTELSAT itself. In conclusion, the Administration recognized:

Governments should not strifle private entrepreneurial initiatives absent sound and compelling public policy reasons. Such incentives should not be discouraged when the services proposed could prove of value to customers, improve their productivity and efficiency, and thus enable American firms to compete more effectively at home and abroad.

White Paper at 50.

We do not believe that the Postal Service has provided sound and compelling public policy reasons that warrant its attempt to eliminate competition in the market for international mail services. Remailers provide specialized bulk mail services to large business mailers. The Postal Service is free to compete for that business, and if forced to innovate, may do well in attracting such business. In any event, the Postal Service provides no evidence that existing private competition from remailers providing specialized international services has had any financial impact on it of a magnitude that jeopardizes its ability to provide universal service. To stifle such competition in the absence of compelling policy reasons would be contrary to the public interest.

V. CONCLUSION

For the reasons set forth above, we believe that adoption of the proposed regulations would stifle lawful competition to the Postal Service. The Postal Service's authority to expand its domestic monopoly to eliminate international competition from

³⁸ See White Paper at 2. In its report and order the FCC made detailed findings as to the public benefits that flow from private international satellite systems. See FCC Report and Order at 34-45; White Paper at 50.

remailers is far from certain, and consequently, requires Congressional clarification. Weighed against this uncertain legal authority, is the certain public benefit that accrues from private sector competition in the provision of international postal services. In these circumstances, the public interest would be poorly served by amendment of the Postal Service's regulations to prohibit a specialized form of remailer competition in the provision of international mail services.

Respectfully submitted,

Douglas H. Ginsburg
Assistant Attorney General
Antitrust Division

Charles F. Rule
Deputy Assistant Attorney
General
Antitrust Division

Barry Grossman, Chief
Communications & Finance Section
Robert E. Hauberg, Jr.
Assistant Chief
Communications & Finance
Martin L. Stern, Attorney
Communications & Finance Section
Jonathan M. Rich, Attorney
Communications & Finance Section
Michael A. Williams, Economist
Economic Regulatory Section
Antitrust Division
U.S. Department of Justice
504 Safeway Building
Washington, D.C. 20530
202/724-6693

December 12, 1985

January 23, 1986

The Honorable John McKean, Chair
USPS/Board of Governors
One California Street, Suite 1200
San Francisco, CA 94111

Dear Mr. McKean:

Last year we wrote to then Postmaster General Carlin in regard to the U.S. Postal Service's (USPS) proposed rule changes in the regulation on the restrictions on private carriage of letters. In that letter, we asked that the USPS extend the comment period from thirty days to sixty days, so the Subcommittee could carefully review the proposed changes and the impact on the USPS and the customers of international remailing services. The extension was granted and the Subcommittee has now had the opportunity to review the matter.

We also asked the USPS to provide us with answers to several questions. The most important of which were, how much volume and revenue is involved and how the public would benefit. The only answer they could provide regarding our question on volume and revenue was, "it is common knowledge...that a number of shippers and carriers engaged in this practice, and we infer from this and other information that the volumes and revenues involved are significant". Concerns about the needs of current users of these services were not even addressed by the USPS.

We cannot understand how the USPS could undertake an action of this kind without even being able to give a rough estimate of the volume and dollars involved, or without knowing the effects of this proposal on current users of remailing services. Further, the Subcommittee learned that of the fifty-seven comments received on the proposed regulation changes, fifty-five of them opposed the USPS proposed action.

In its comments, the Department of Justice (DOJ) stated, "we believe that adoption of the proposed regulations would stifle lawful competition to the Postal Service. The Postal Service's authority to expand its domestic monopoly to eliminate international competition from remailers is far from certain, and consequently, requires Congressional clarification. Weighed against this uncertain legal authority, is the certain public benefit that accrues from private sector competition in the provision of international postal services. In these circumstances, the public interest would be poorly served by amendments of the Postal Service's regulations to prohibit a specialized form of remailer competition in the provision of international mail service."

Accordingly, the Subcommittee finds no justification or basis for the action proposed by the USPS. However, we have instructed the Subcommittee staff to continue studying the matter in more depth to determine if any clarification is necessary. We will, of course, keep you informed of our findings.

Sincerely,

MICKEY LELAND
Chairman

FRANK HORTON
Ranking Minority Member

ROBERT GARCIA
Member

cc: The Honorable William D. Ford, Chairman
House Committee on Post Office & Civil
& Service and Members of the Committee

26 February, 1986

The Honorable Albert V. Casey
Postmaster General
United States Postal Service
475 L'Enfant Plaza, S.W., Room 10022
Washington, D.C. 20260-1000

Dear Mr. Postmaster:

I understand that on 3 March 1986, the Board of Governors of the United States Postal Service will consider proposed rules that, if adopted, will materially and adversely affect the ability of remail services to compete for international mail traffic. Our Antitrust Division filed comments with you on 12 December 1985, opposing these proposed rules. I would like to reiterate the concerns of this Department about the effect of the proposed rules on competition and consumer welfare.

As the Antitrust Division has explained, there are significant public benefits from lawful private sector competition in the provision of international postal services. Remailers have been able to offer service to United States businesses competing abroad at costs and terms that are apparently viewed by users as better than those offered by the Postal Service. I understand that competition from remailers has forced the Postal service to introduce new international services. By stifling lawful private sector competition, the proposed regulations will undermine economic efficiency and will inhibit Postal Service incentives to innovate and to price its international services competitively — all to the detriment of consumer welfare.

Given the Administration's policy in favor of competition and against unnecessary regulation, I urge you to follow the recommendation filed by our Antitrust Division and not promulgate the proposed rules. I understand that these same issues will be relevant to Administration review of the 1984 Universal

Postal Union Convention, and I hope the Convention will be submitted shortly for Administration review. By copy of this letter, I am informing the remaining members of the Board of our position on this matter.

Sincerely,

EDWIN MEESE III
Attorney General

cc: Members of the Board of Governors,
United States Postal Service

28 February 1986

Honorable Albert V. Casey
Postmaster General
U.S. Postal Service Headquarters
Washington, D.C. 20260-1000

Dear Mr. Casey:

The Board of Governors of the Postal Service will consider the issue of international remain at its March 3 meeting. The United States Postal Service (USPS), in an October 10, 1985, *Federal Register* notice, proposes to restrict private companies from providing international remail service. The Department of Commerce opposes this proposal. I urge you not to adopt it.

The proposal to restrict international remail service should be put aside on the basis of business' expressed needs and U.S. trade policy. U.S. businesses use the services of private companies for remail because their service is less expensive and faster than the alternative being developed by USPS. International remail service provides a valuable service for U.S. international business firms. To prohibit U.S. companies from using these services would place the firms at a disadvantage vis-a-vis our foreign competitors.

In addition, the U.S. international business community overwhelmingly opposes the USPS proposal. This is borne out by the comments received by USPS following its *Federal Register* notice as well as a poll commissioned by the International Remail Committee.

Please let me know if you would like further information.

Sincerely,

Malcolm Baldrige
Secretary of Commerce

28 February 1986

Honorable Albert V. Casey
Postmaster General
U.S. Postal Service
475 L'Enfant Plaza, S.W., Room 10022
Washington, DC 20260-1000

Dear Mr. Casey:

On October 10, 1985, the U.S. Postal Service (USPS) proposed a revision in its regulations implementing the Private Express Statutes that would have the effect of restricting the operations of international "remailers." We understand the USPS Board of Governors plans to consider this proposal on March 3, 1986.

The Office of Management and Budget recommends that the Board not adopt the proposed revisions. We believe the revisions would restrict competition in international mail service, because international remailers would be unable to offer many, if not all, of their current services. Competition from international remailers has increased innovation and improved service levels in this market. The Department of Justice has found that private international remailers currently provide faster service to more countries, typically at lower rates, than does the competitive program offered by the USPS. The proposed changes would harm consumers of international mail services by increasing their costs and reducing the quality and variety of international mail services available to them. Since most of the users of international remailers' services are U.S. firms with international activities, this action would also reduce U.S. competitiveness abroad.

We are concerned that if the proposed changes are adopted, consumers of international mail services will not be protected either by competition or by regulation. Unlike domestic mail rates, rates for international mail are not subject to regulation by the Postal Rate Commission.

The rationale presented by the USPS for the proposed rule is that current practices deprive the USPS of revenue. We do not believe this is an adequate justification for extending the USPS monopoly, for it would permit no limits to extending that monopoly to any form of service where the USPS faces competition. It is the policy of this Administration to foster competition wherever possible, because of the benefits it produces for consumers. We believe that the USPS should also be seeking feasible opportunities to promote competition, within its statutory authority and obligations.

On a related matter, we are seriously concerned about the USPS's delay in submitting the 1984 Universal Postal Union Convention to the State Department. Delay in sending the treaty forward can impede the ability of the President to exercise his Constitutional and statutory discretion to oversee the foreign affairs of the United States and may cast doubt on our resolve to act expeditiously in fulfilling our international responsibilities.

Sincerely yours,

James C. Miller III
Director

2 April 1986

Honorable Alfonse D'Amato
United States Senate
Washington, D.D. 20510

Dear Senator D'Amato:

I am writing in response to your February 13, 1986 letter to Attorney General Meese. Your letter seeks written confirmation from the Department of Justice that international remailers "are not acting illegally" under current Postal Service regulations.

I am enclosing for your information a letter from the Attorney General to Postmaster General Casey that indicates our view that remailers currently provide "lawful private sector competition" to the Postal Service. I also enclose a March 4, 1985 Statement of John R. McKean, who is the chairman of the Postal Service Board of Governors. That statement indicates that the Board of Governors views competition from remailers as being in the public interest. That statement also indicates that the Board of Governors has ordered the Postal Service to commence a rulemaking proceeding to "remove the cloud" over remailing that, in their opinion, is created by current Postal Service regulations.

Under these circumstances, you may be assured that the Department of Justice will not seek to prosecute international remailers or their customers on the basis of the current regulations.

We hope that you find this information useful in clarifying the lawfulness of international remail and in minimizing the adverse effects that the current situation has had on your remailer constituents.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosures

cc: Louis A. Cox, Esquire
General Counsel
U.S. Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

POSTAL SERVICE

39 CFR Parts 310 and 320

Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rule; Advance Notice of Proposed Rulemaking and Request for Information

AGENCY: Postal Service

ACTION: Withdrawal of proposed rule; advance notice of proposed rulemaking and request for information.

SUMMARY: On October 10, 1985, the Postal Service published in the Federal Register [50 FR 41462] a proposed modification and clarification of the regulations on the Private Express Statutes, with minor and procedural revisions on October 22, 1985 (50 FR 42729) and November 8, 1985 (50 FR 46464). The proposed rule, which is hereby being withdrawn, dealt for the most part with the carriage of international letters by private firms who remail them outside the United States.

The Postal Service received a significant number of comments on the proposed rule. Following review of the comments, the Chairman of the Board of Governors of the Postal Service issued a statement, which is reproduced below. The Chairman noted, among other things, that the remail issue has generated considerable controversy about the proper scope of the Private Express Statutes and implementing regulations. Accordingly, the Chairman announced that a new rulemaking proceeding will be initiated as soon as a factual record is fully developed. The Postal Service has sent a letter to each commenter, a sample of which is reproduced below, requesting information for that record. The principal purpose of this notice is to request the same information from other members of the public.

DATE: Withdrawal of the proposed rule is effective March 20, 1986. Comments and information needed to develop a full and factual record must be received on or before April 30, 1986.

ADDRESS: Written comments and information should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, DC 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 5128, 955 L'Enfant Plaza, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley, (202) 268-2970.

SUPPLEMENTARY INFORMATION: As noted above, the Postal Service is undertaking to develop a factual record in preparation for a new rulemaking proceeding and has sent a letter to each commenter soliciting information for that record. The Postal Service requests the same information from other members of the public. Accordingly, a sample of the letter is reproduced here, along with the Statement of the Chairman of the Board.

List of Subjects in 39 CFR Parts 310 and 320

Postal Service, Computer technology, Advertising.

W. Allen Sanders,
Associate General Counsel, Office of General Law and Administration.

March 14, 1986.

Dear _____: For the reasons more fully discussed in the enclosed statement by John McKean, Chairman of the Board of Governors, the Postal Service is undertaking to gather information and develop a factual record in preparation for the initiation of a new rulemaking proceeding relating to the practice of international remailing. We are writing to you, s a person

who submitted comments in response to our earlier notice of proposed rulemaking on this subject, to solicit information for that record.

The particular focus of our inquiry is the appropriate scope of a new suspension of the Private Express Statutes which may be necessary to serve the interests of our customers. We solicit information from you as to the kind or kinds of private services which in your experience have met, or in your estimation would meet, your needs or the needs of the public, with respect to letters being sent to addressees in foreign countries, more satisfactorily than those provided by the Postal Service. Of greatest value to us in this respect would be information that addresses such points as the following:

- The nature of the correspondence;
- The degree of urgency and the type of harm that would be caused by delay;
- Any differential in promptness of service between letters that are "remailed" and those sent through the Postal Service;
- Whether the correspondence is eligible for private carriage under the current loss-of-value test of the suspension for extremely urgent letters (see 39 CFR 320.6(b), copy attached);
- The extent to which the correspondence is intra-company;
- The extent to which letters privately carried to foreign countries are "remailed" or are delivered to the addressees by private means;
- Any estimate of the volume of letters "remailed" over the past year;
- Any differential in cost between letters privately carried and letters sent through the Postal Service;

- The extent to which considerations of cost rather than speed of delivery determine the choice of carrier for letters sent overseas; and
- The extent to which a suspension for remailing would preserve the benefits of desirable competition between the Postal Service and private companies.

This is by no means an exhaustive list of points that may be material to the development of the full factual record that we need as a basis for proposing a new suspension of the Statutes. We welcome any additional information and urge that it be as factual and specific as possible. We also solicit your views as to the scope of a suspension which will best serve the relevant interests, and we invite you to suggest specific language for an implementing regulation.

We anticipate proceeding in accordance with the following schedule:

April 30, 1966 — Responses due to solicitation of information for factual record.

May 22-23, 1966 — Meeting with interested persons to discuss responses and parameters of proposed suspension.

June 16, 1966 — Publish notice of proposed rulemaking in Federal Register.

July 16, 1966 — Comments due on proposed rule.

August 29, 1966 — Publish notice of final rule.

We ask that you send your response so as to reach me not later than Wednesday, April 30, 1966.

We are withdrawing the earlier proposal in order to avoid uncertainty over its status while this new proceeding is pending. To the extent that the earlier proposal dealt with the suspension for extremely urgent letters on matters other than international remailing, we anticipate initiating a further proposal in the near future.

If you have questions, my telephone number is (202) 268-2970.

Sincerely,

Charles D. Hawley,
Assistant General Counsel, General
Administration Law Division, Law Department

Enclosures

39 CFR 320.6(b)

(b)(1) For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be completed within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. For other letters, delivery must be completed within 12 hours or by noon of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits. For any part of the shipment of letters to qualify under this paragraph (b), each of the letters must be extremely urgent.

(2) Letters sent from the 49 contiguous states of the United States to other jurisdictions of the United States or to other nations are deemed "delivered" when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states. Letters sent from other jurisdictions of the United States or from other nations into the 48 contiguous states are deemed "dispatched" when they are in the custody of the domestic carrier, having been passed by United States Customs, if applicable, at the letters' point of arrival in the 48 contiguous states.

(3) Except as provided in this paragraph (b)(3), the times and time limits specified in paragraph (b)(1) of this section are

not applicable to any locations outside the 48 contiguous states. The times and time limits specified in paragraph (b)(1) are applicable to letters dispatched and delivered wholly within Alaska, Hawaii, Puerto Rico or a territory or possession of the United States. The regulations provided in paragraph (b)(2) relating to the delivery and dispatch of letters are applicable by analogy to letters shipped between these jurisdiction and other nations.

Statement of John R. McKean, Chairman, United States Postal Services Board of Governors, on Remail Issue

March 4, 1986

As some of you may be aware, the Postal Service recently initiated a rulemaking concerning its regulations under the private Express Statutes. That rulemaking involved the rules bearing on the carriage of international mail by private firms who remail it outside the United States.

In response to this proposed rulemaking, the Postal Service has received a significant number of comments. The Board of Governors has been kept informed of the nature of these comments.

The remail issue has generated considerable controversy about the proper scope of the monopoly under which we operate. It is worth emphasizing that Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.

It is the sense of the Board that private sector competition with the Postal Service in the provision of international remailing services can—and already does—produce significant

benefits for the public. Ultimately, even the Postal Service itself can benefit from this kind of competition.

Many businesses appear to view the private sector alternative as preferable to the service we are providing — preferable in terms of price and service. That tells us something important about the way we are now doing our job in this area. The monopoly was not intended to protect us from having to face up to our own shortcomings. I am glad to say that the competition from private remailers has already spurred us on to improve our own efforts and be more competitive in providing international mail services.

As things now stand, therefore, remail services would appear to advance consumer welfare while at the same time fostering innovation and economic efficiency.

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people. Yet we have to deal with the laws and regulations now on the books. As now drafted, they do not appear to leave room for the lawful operation of international remail services. At the very least there is a serious question on this point.

The Board of Governors believes that the appropriate course of action under these circumstances is to change our regulations to make them conform to sound public policy. Accordingly, we are announcing today that the Postal Service will soon be initiating another rulemaking proceeding, this time to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies.

The Private Express Statutes permit us to suspend their application when the public interest so requires. Such a suspension must be predicated on a fully developed factual record. The

Postal Service intends to take the steps necessary to gather information in this regard and proceed with a new rulemaking as quickly as possible.

[FR Doc. 86-6107 Filed 3-20-86; 8:45 am]

Billing Code 7790-13-

March 26, 1986

The Honorable John McKean, Chairman
Board of Governors
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D. C. 20260

Dear Mr. McKean:

I was extremely disturbed by the letter dated March 14, 1986 by an Assistant General Counsel of the USPS in which he couched the Remailing Issue *in terms of a suspension of the Private Express Statutes*. As you are well aware and as the author of the March 14, 1986 letter should be aware, the Remailing Issue does not, in any way, involve a suspension of the Private Express Statutes.

As noted in the comments of the U.S. Department of Justice dated December 14, 1984, it is not clear that Congress intended to grant USPS a monopoly over international mail as well as domestic mail. Indeed, applicable canons of statutory interpretation and relevant case law tend to indicate that Congress did not intend for the monopoly to extend to international mail. At best, the intent of Congress on this issue is ambiguous. Until this issue is resolved as a matter of law, the USPS need not and should not even consider suspending the Private Express Statutes.

The regulations originally proposed by the USPS, in effect, extend the monopoly to international mail. This is a wholly improper exercise of the rule making authority of the USPS. The scope of the monopoly is a question of public policy and is to be determined only by Congress. Until Congress makes this determination, the issue of suspending the Private Express Statutes is not even relevant.

We strongly advise both the Board and the USPS not to persist in this misinterpretation of the law and of the Remailing Issue.

Sincerely,

MICKEY LELAND
Chairman

ML/dl

May 2, 1986

U.S. Department of Justice
 Antitrust Division
 Charles D. Hawley, Esquire
 Assistant General Counsel
 United States Postal Service
 475 L'Enfant Plaza, S.W.
 Washington, D.C. 20260-1100

Re: Restrictions on Private Carriage of Letters;
 Withdrawal of Proposed Rules; Advance
 Notice of Proposed Rule-making and Request
 for Information

Dear Mr. Hawley:

I am writing in response to your March 18, 1986 letter to the Department of Justice ("Department") requesting information that might be considered by the Postal Service in fashioning a suspension of the Private Express Statutes for international remail services. I understand that an identical letter has been sent to all parties that filed comments in the remail rulemaking.¹

Pursuant to the March 4, 1986 statement by John McKean, Chairman of the Board of Governors of the Postal Service ("McKean Statement"), the Postal Service was ordered to withdraw the previously proposed rules on which we and others commented,² and to initiate a new rulemaking to "preserve the

¹Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, 51 Fed. Reg. 9852 (March 21, 1986) ("Notice").

²Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; 50 Fed. Reg. 41462 (October 10, 1985); *See also* Comments of the United States Department of Justice, In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and

benefits of desirable competition between the Postal Service and private companies."³ The letter and Notice represent that the information requested is needed "as a basis for proposing a new suspension of the [Private Express] Statutes" and solicit "views as to the scope of a suspension which will best serve the relevant interests" and specific language for implementing regulations."⁴

The Department sees no need for a new rule. As the Attorney General has stated, international remail represents "lawful private sector competition to the Postal Service."⁵ Moreover, the Department has indicated that it will not prosecute remailers or their customers on the basis of current Postal Service regulations.⁶ Under these circumstances, a protracted rulemaking will only serve to raise uncertainty as to the legal status of lawful private sector services that numerous executive agencies and the Board of Governors of the Postal Service find beneficial to consumers.

Furthermore, even if a new rule were necessary to clarify that international remail is lawful, the comments filed in the earlier remail proceeding and the Postal Service's own internal reports provide an ample record on which to base any rule that the Postal Service deems necessary to "remove the cloud" over remail that it sees under current regulations.⁷ The information request and the accompanying procedural schedule will only delay resolution of this matter.

of Regulations on Extremely Urgent Letters, December 12, 1985, ("Department Comments").

³Notice, 51 Fed. Reg. at 9853.

⁴Notice, 51 Fed. Reg. at 9852.

⁵*See* Letter from Attorney General Edwin Meese to Postmaster General Albert V. Casey, February 26, 1986 (copy attached).

⁶*See* Letter from Assistant Attorney General John R. Bolton to Senator Alfonse D'Amato, April 2, 1986 (copy attached).

⁷*Id.* at 51 Fed. Reg. 9853. *See generally* Department Comments at 19-22.

In sum, the Postal Service's conduct of the remail proceeding may reflect a fundamental reluctance to accept the benefits of marketplace competition, contrary to the expressed mandate of the Board of Governors:

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.⁸

Consistent with this policy pronouncement, and the policy of this Administration to foster and promote private sector competition in international mail, we strongly urge the Postal Service to abandon the remail proceeding. Alternatively, the Postal Service should resolve the proceeding expeditiously on the basis of the existing record so that the benefits of private sector competition may continue to be enjoyed by consumers on international mail services.

Please include this document in the public file of this proceeding.

Sincerely,

Charles F. Rule
Deputy Assistant Attorney General
Antitrust Division

Enclosures

⁸See Notice, 51 Fed. Reg. at 9853. See also Department Comments at 19-22.

POSTAL SERVICE

39 CFR Parts 310 and 320

Restrictions on Private Carriage of Letters; Meeting

AGENCY: Postal Service.

ACTION: Notice of public meeting.

SUMMARY: This document provides notice of a public meeting relating to the initiation of a new rulemaking proceeding concerning the Private Express Statutes and the practice of international remailing. All persons desiring to attend the meeting should notify the Postal Service by May 15, 1986.

DATES: 10:00 A.M., Thursday, May 22, 1986 (If necessary, on Friday, May 23, 1986.)

ADDRESS: Conference Room, Room No. 5183, 955 L'Enfant Plaza SW., Washington, DC (The location is subject to change if the number of persons desiring to attend exceeds the capacity of this conference room.)

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley, (202) 268-2970.

SUPPLEMENTARY INFORMATION: The Postal Service intends to hold a public meeting in connection with its undertaking to gather information and develop a factual record in preparation for the initiation of a new rulemaking proceeding concerning the practice of international remailing, as previously announced on March 21, 1986, in the Federal Register (51 FR 9852).

Discussion will focus on comments submitted by interested persons in response to the March 21, 1986 Federal Register notice, the need of the public for international services not met by the Postal Service, and the scope of a proposed suspension of the Private Express Statutes to permit international remailing. However, no decision on the nature or scope of a proposed suspension will be made or announced at this meeting. The

meeting is scheduled for May 22, 1986, at 10:00 a.m., and, if necessary, will reconvene on May 23, 1986. All persons desiring to attend the meeting are asked to notify the Postal Service, at the telephone number listed above, by the close of business on May 15, 1986. If the anticipated seating requirements exceed the capacity of the announced meeting room, a change in the room location will be announced on or before May 19, 1986.

Fred Eggleston,
Assistant General Counsel, Legislative Division

[FR Doc 86-10556 Filed 5-9-86; 8:45 am]

POSTAL SERVICE

39 CFR Part 320

Restrictions on Private Carriage of Letters; Proposed, Suspension of the Private Express Statutes; International Remailing

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: On March 21, 1986 the Postal Service published in the Federal Register (51 FR 9852) an advance notice of proposed rulemaking and request for information on which to develop a factual record concerning international remailing, and also withdrew a previously published proposed rule.

The purpose of this document is to propose a new suspension of the Private Express Statutes for international remailing. This suspension would implement the statement of March 4, 1986 by John McKean, Chairman of the Board of Governors, that the cloud should be removed from the practice of international remailing. See 51 FR 9853. The proposed suspension would permit the private uninterrupted carriage of letters from the United States to a foreign country for ultimate delivery outside of the United States.

DATE: Comments must be received on or before July 17, 1986.

ADDRESS: Written comments should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, D.C. 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 AM and 4:00 PM, Monday through Friday, in Room 6147, 475 L'Enfant Plaza, West, SW., Washington, D.C. (until on or about June 23, 1986, the location will be Room 5128, 955 L'Enfant Plaza, SW., Washington, DC.).

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2970.

SUPPLEMENTARY INFORMATION: On October 10, 1985, the Postal Service proposed to amend several provisions of the regulations, 39 CFR Parts 310-320, that implement the Private Express Statutes. 50 FR 41462 (1985). The purpose of the proposal for the most part was to clarify the administrative suspension of the Statutes for extremely urgent letters, 39 CFR 320.6, with respect to the practice of international "remailing." Private firms, believing themselves to be acting pursuant to this suspension, had begun to carry bulk shipments of letters from American firms, entirely outside the United States Mails, to foreign countries. There the letters, addressed to individuals in countries other than the United States, were deposited with a foreign post office, or "remailed," and delivered to their various addresses as ordinary mail.

The Postal Service had determined in an advisory opinion, 39 CFR 310.6 that the carriage of letters in bulk, under the circumstances characteristic of the remailers' operations, did not comply with the terms of that suspension. Advisory Opinion 83-7 (May 11, 1983). During December 1984, the Postal Service requested the Department of Justice to authorize suit to enjoin the activities of those remailers who were continuing to violate the Private Express Statutes in contravention of the advisory opinion. In August 1985 the Department informed the Postal Service that it declined to do so.

While we do not question the Postal Service's authority to regulate the solely domestic activities of international courier services, our decision is based on the conclusion that the Postal Service's implementing regulations may reasonably be construed to permit the complained of activity.

The effect of this decision was to allow the private carriage of letters that were not extremely urgent under the color of a suspension adopted by the Postal Service for letters that were

extremely urgent. Of perhaps more importance, its effect was to create a significant exception to the Private Express Statutes that had never been approved, or even contemplated, either by Congress, or by the Postal Service in the exercise of its power to suspend the operation of the Statutes, 39 U.S.C. 601(b). To correct this situation and to restore the suspension for extremely urgent letters to its original purpose, the Postal Service in October 1985 proposed the clarifying amendments noted above.

In response to the publication of this notice, the Postal Service received approximately sixty comments, virtually all of them critical of the proposal. Subsequently, John McKean, Chairman of the Board of Governors of the Postal Service, stated on March 4, 1986, that the Postal Service would be initiating a new rulemaking proceeding to remove the cloud of [doubt as to lawfulness] that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies.

As the first step in implementation of this statement, the Postal Service on March 21, 1986, published in the Federal Register a notice withdrawing the October 10, 1985 proposal and soliciting information on the benefits to the public of remailing to become part of a "fully developed factual record" upon which to predicate a new suspension (51 FR 9852). In the hope of further supplementing the record, the Postal Service on May 12, 1986 announced that it would hold a public meeting (51 FR 17366), which was held on May 22, 1986. A transcript of that meeting is included in the record of this rulemaking.

In the related proceedings described above, the Postal Service has heard the views of a great many members of the public and several other Federal agencies on the question of the benefits which the public may receive from the availability of private international remail services. It is clear that the overwhelming majority of those who have commented favor a regulation which permits such services. The reasons which they

advance are several: It is faster, less expensive, more reliable, and more responsive than the air mail service provided by the Postal Service. It is said that American business is better able to compete in foreign markets when service of this nature is available. Competition in the provision of international letter delivery service is also said to be inherently beneficial, both to the customers who use this service and to the Postal Service itself.

Some commenters have also directed criticism against the terms of the proposed amendments. In view of the fact that those proposals have been withdrawn, we think it unnecessary to respond to these criticisms.

Applicability of Private Express Statutes to International Shipments of Letters

One comment raised the threshold question of the applicability of the Private Express Statutes to international shipments of letters. This is fundamental, of course, because, if the Statutes were not applicable, no suspension or exception would be needed to permit the activities of the remailers. The Postal Service is not persuaded, however, that there is any merit to this comment. It is based on the commenter's views of public policy, but it fails to take into account clear expressions of the intent of Congress to apply the Statutes to letters leaving and entering this country.

This intent can be seen most clearly with respect to two of the statutes which contain provisions relating to the transportation of letters by vessels to and from foreign countries. 18 U.S.C. 1699; 39 U.S.C. 602. The legislative history of the 1952 amendment to 18 U.S.C. 1699 leaves no room for doubt that Congress contemplated the application of the Statutes to letters arriving from foreign countries. See S. Rep. No. 1794, 82d Cong., 2d Sess. June 19, 1952:

Under excising law, no vessel arriving in a given port is allowed to break bulk until all letters on board are delivered to the nearest post office. To illustrate how this works is to take the port of Boston, generally the first call on the North Atlantic route of vessels from Europe. . .

The text of 39 U.S.C. 602(a) relating to outgoing letters is, if anything, even more clear on this point:

§602. Foreign letters out of the mails

(a) Except as provided in section 601 of this title, the master of a vessel departing from the United States for foreign ports may not receive on board or transport any letter which originated in the United States that-

(1) has not been regularly received from a United States post office. . . .

We continue to adhere, therefore, to our conclusion that the Statutes are applicable to the carriage of international letters within the United States.

A second related point raised by several commenters is that there is no need for action by the Postal Service because other agencies of the Executive Branch, particularly the Department of Justice, have concluded that remailing is lawful under current regulations.

We find no merit in this comment, either. The Postal Service is in the best position to know its own intention when it adopts a suspension. The Advisory Opinions have stated these intentions consistently through the years. Furthermore, the regulation at issue has never been the subject of adjudication, or of an Opinion of the Attorney General. Under these circumstances, we think it was reasonable for Chairman McKean to conclude that a further rulemaking is necessary.

A number of other comments challenge on various grounds the authority of the Postal Service to regulate the private carriage

of letters and, as a carrier of letters, to adopt regulations which, it is said, unfairly handicap competing private firms also engaged, or wishing to engage, in the international carriage of letters. We consider, however, that these comments are not well taken. In adopting the regulations contained in Parts 310-320, Title 39, Code of Federal Regulations, the Postal Service has merely implemented the private Express Statutes. It is these Statutes which limit the private carriage of letters upon which postage has not been paid.

This is not a situation in which the postal Service is imposing regulatory limitations upon an industry which would otherwise conduct its operations free of governmental restraint. The regulations define, interpret, and clarify the Statutes and, in the case of Part 320, relax for specific limited purpose, the restrictions of the Statutes, to provide as lawful basis for private carriage which the Statutes otherwise would not permit. If the postal regulations, and particularly those in Part 320, were not in effect, the result would not be unrestricted private competition with the Postal Service but no lawful private carriage at all, except as allowed by very limited statutory exceptions.

In enacting the Private Express Statutes, Congress has made the policy decision that the revenues of the Postal Service should be protected by restricting the private carriage of letters. The Postal Service is not simply one of several enterprises providing letter delivery services. It is, rather a Government agency which is to be "operated as a basic and fundamental service" for the American people. 39 U.S.C. 101(a). While the Postal Service has endeavored, since the enactment of the Postal Reorganization Act, to operate in conformity with the business practices and management methods of the private sector, it is nonetheless a public entity and as such is not free to disregard Congress decision. Under the circumstances, we conclude that there is no valid basis for suggesting that the Postal Service is unlawfully or unfairly attempting to regulate the private sector.

The Public Interest in Remailing

As we have noted above, the overwhelming majority of the comments on our proposals have favored allowing the remailers to compete with the Postal Service and have advanced a number of reasons for this result. Greater speed of delivery, in comparison with air mail, and its resultant benefits to America's ability to compete in overseas markets is perhaps the most frequently raised point. The record is less than fully factual as to this matter. Two commenters have submitted tables showing a comparison of delivery times for letters sent via the Postal Service and via remailers to various cities in Europe, Asia, Africa, and Latin America. These comparisons almost invariably show remailed items with a shorter delivery time. Little or no explanation is given, however, of the manner in which these tables were compiled, of whether they show average times for more than one remailer, of what period of time or what volume of letters the figures represent, in short, how valid the comparisons are. The figures themselves show wide fluctuations between cities, in the differentials between the Postal Service and remailers and in some instances between times by the same mode to the same city. While the apparently anecdotal character of these tables does not add to their credibility, they may well be the most reliable compilations available on this subject. They are, moreover, consistent with the conclusory statements of a number of other commenters.

On the issue of the need for remailing services to assist in making American business more competitive in the world market, the comments provide little more than conclusions. It seems self-evident that a more prompt and reliable letter delivery service would, to some extent, assist parties to existing or prospective business transactions by facilitating written communication. What is less clear, however, is the extent to which any difference that may exist between air mail and remail is significant in this respect, particularly given the wide fluctua-

tions in the delivery time of remail services which we have noted above. We had sought to obtain information from the public which would permit us to determine whether there is a range of time within which delivery is critical to the success of competitive efforts, but our efforts were not successful. Nonetheless, notwithstanding the imprecision of the data, we think it reasonable to conclude that in general the availability of remail services assists American firms in competing internationally.

As to the cost of remail, we have little factual information about the rates charged by remailers. The comments frequently assert that they are lower and we know from observation of promotional material distributed by remailers that they characteristically advertise rates that are lower than air mail, sometimes simply a percentage of the air mail rates. While many comments assert that speed or reliability, rather than price, is the main incentive for the use of remailers' services, we have no doubt that the remailers as a group charge lower rates than the prevailing rates for the Postal Service's international air mail service.

As with the previous points, the record contains little hard evidence as to either the comparative reliability of remail delivery or of the responsiveness of the remailers to the needs of their customers, save that the collection of letters from customers' locations is a characteristic of remailers services. Other than that, we have only the generalized and conclusory statements of commenters to support these points.

There is little or no reliable information as to the amount of revenues diverted to date by the activities of remailers. Estimates run from about \$25 million to \$500 million annually. One comment to the original proposal concluded that the net revenue loss to the Postal Service was in the neighborhood of \$3 million a year. Without attempting to determine the accuracy of these estimates, we can say that the total amount of revenues of the Postal Service from international mail-much of which is not letters and so is not protected from competition by the

Statutes-was \$882.3 million for the most recently published figures. Annual Report of the Postmaster General, 1985. We conclude that the loss of revenues of what is necessarily a lesser amount is not so adverse to the Postal Service as to outweigh the perceived benefits to the public interest from allowing remailing to continue by virtue of the suspension which follows.

Proposed Suspension for International Remailing

For the reasons given above the Postal Service proposes to amend its regulations by adding a new suspension for international remailing. This new suspension, which would be codified as §320.8 of title 39, Code of Federal Regulations, would suspend the operation of the Statutes

to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

This, we think, fairly summarizes the essential character of remailing. It is intended as a forthright acceptance of that practice as the Postal Service now understands it. It is essential, however, that the terms of the suspension be adhered to in good faith and that the suspension not be broadened by abuse to encompass private carriage under circumstances not contemplated in its adoption.

We particularly invite attention to two provisions of this paragraph. The first is "uninterrupted" as a qualification of allowable carriage. By this we mean simply that to come within the terms of the suspension the carriage of letters from a point within the United States to the point at which they are deposited in a foreign mail stream must be substantially continuous. It is not necessary that they be continuously in the hands of a single carrier, nor is it a violation of the terms of the suspension if they are held for sortation or mixed with letters originated by another sender. They must not, however, be opened, read, or otherwise

used in the course of carriage, nor may they be delivered during carriage to any person not involved in that carriage. To help in explaining the meaning of this qualification, we have included in the text of the proposed regulation two contrasting examples of circumstances in which carriage is and is not interrupted. This qualification does not alter the current practice of remailing. It is intended rather to ensure that the suspension does not serve as a pretext for allowing private carriage of letters from one point to another wholly within the United States.

The second provision to which we particularly invite attention is that which requires that letters carried under the suspension be for ultimate delivery outside the United States. The suspension is not intended for the delivery of letters sent to persons within this country. That would be totally at odds with the revenue protection purposes of the Private Express Statutes and would in no way advance the public interest in improved delivery of letters to foreign locations. As with the requirement that carriage be uninterrupted, this provision is intended to ensure that the suspension not be abused. This provision is reinforced by proposed paragraph (b) which states:

This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

Finally, as was true in the adoption of the suspension for extremely urgent letters, see 39 CFR 320.6(e), the regulation provides in proposed paragraph (c) an administrative sanction which may be brought into play in the event of a violation of the substantive terms of the suspension. This sanction is the revocation of the suspension *as to the particular shipper or carrier* for a period of up to a year. This procedure, which involves an opportunity for a hearing before the Postal Service's Judicial Officer Department, offers a flexible means of enforcement of the limited restrictions which qualify the suspension. They are reasonable and appropriate under the circumstances. In view of

the above considerations, the Postal Service proposes to amend 39 CFR Part 320 as follows:

List of Subjects in 39 CFR Part 320

Postal Service, Computer technology, Advertising.

PART 320-SUSPENSION OF THE PRIVATE EXPRESS STATUTES

1. The authority citation for Part 320 is revised to read as set forth below, and the authority citations following all the sections in Part 320 are removed.

Authority 39 U.S.C. 401.404,601-101;18U.S.C. 1693-1699

2. A new §320.8 is added to read as follows:

§320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and §310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

Example (1) The letters to overseas customers of commercial firm A in Chicago are carried by Carrier B to New York where they are delivered to Carrier C for carriage to Europe. Carrier C holds the letters in its distribution center overnight, then sorts them by country of destination and merges them with letters of other firms to those countries before starting the carriage to Europe in the morning. The carriage of firm A's letters is not interrupted. The suspension for international remailing applies to the carriage by Carrier B and by Carrier C.

Example (2) The bills addressed to foreign customers of the Chicago branch office of commercial firm D are carried by

Carrier E to New York where they are delivered to the accounting department of firm D's home office. The accounting department uses the information in the bills to prepare its reports of accounts receivable. The bills are then returned to Carrier E which carries them directly to Europe where they are entered into the mails of a foreign country. The carriage of the bills from Chicago to Europe is interrupted in New York by the delivery to firm D's home office. The suspension for international remailing does not apply to the carriage from Chicago to New York. It does apply to the subsequent carriage from New York to Europe.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

Example (1) A number of promotional letters originated by firm F in Los Angeles are carried by Carrier G to Europe for deposit in the mails of a foreign country. Some of the letters are addressed to persons in Europe, some to persons in the United States. The suspension for international remailing does not apply to the letters addressed to persons in the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding instituted by the General Counsel in accordance with Part 959 of this chapter.

The failure of a shipper or carrier to cooperate with an authorized inspection or audit conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the Private Express Statutes by administrative

proceedings for collection of postage (see §310.5) or by civil or criminal proceedings.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

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Before the
UNITED STATES POSTAL SERVICE
Washington, D.C. 20260-1113

IN THE MATTER OF:

Restrictions on Private Carriage of Letters; Proposed Suspension of the Private Express Statutes; International Remailing

COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE

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July 17, 1986

I. INTRODUCTION AND STATEMENT OF POSITION

By Notice of Proposed Rulemaking,¹ the United States Postal Service has solicited comments on a proposed regulation that expressly would permit international remail. The new rule would suspend the Private Express Statutes to "permit the uninterrupted carriage of letters from the United States to a foreign country for ultimate delivery outside the United States".² The Department of Justice "Department" supports the proposed regulation.

In late 1985, the Postal Service proposed a rule to make remail unlawful.³ The Executive Branch — including the Department⁴ — and numerous private parties raised strong

¹ 51 Fed. Reg. 21,929 (June 17, 1986).

² 51 Fed. Reg. at 21,929. The Postal Service emphasizes that the new rule would only permit remail if the carriage of mail is "uninterrupted". The rule would allow a remailer to sort mail within the United States and to transfer mail to another carrier for part of the journey. It would not, however, allow a company to intercept letters to amend them or read them before they go overseas. 51 Fed. Reg. at 21,931-21,932. The suspension would not permit remailers to carry letters "out of the mails to any foreign country for subsequent delivery within the United States". *Id.*

³ 50 Fed. Reg. 41,562 (October 10, 1985).

⁴ Comments of the United States Department of Justice Before the United States Postal Service, In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters, December 12, 1985 ("Remail Comments"); Letter from Attorney General Edwin Meese III to Postmaster General Albert V. Casey, February 26, 1986; Letter from Secretary of Commerce Malcolm Baldrige to Postmaster General Albert V. Casey, February 28, 1986; Letter from Office of Management and Budget Director James C. Miller III to Postmaster General Albert V. Casey, February 28, 1986; Letter from Council of Economic Advisers Chairman Beryl W. Sprinkel to Postmaster General Albert V. Casey, February 27, 1986.

objections to that proposal.⁵ On March 4, 1986, John McKean, Chairman of the Board of Governors of the Postal Service, declared that the Postal Service would instead promulgate a regulation that would clearly legitimate remail.⁶ The instant proposal implements that order.

Before proposing this regulation, the Postal Service solicited information on remail and international mail service.⁷ The Department filed comments in that proceeding⁸ questioning the need for a new rule in light of the Attorney General's conclusion that remail is "lawful private sector competition to the Postal Service"⁹ and the Department's statement that it will not prosecute remailers or their customers' on the basis of current regulations.¹⁰

In our view, the proposed regulation is based on an ample factual record that demonstrates that competition in international mail is in the public interest. The proposal, in conformance

⁵ See, e.g., Comments of the New Postal Policy Council, In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters, December 12, 1985.

⁶ Statement of John McKean, Chairman of the Board of Governors of the United States Postal Service, March 4, 1986.

⁷ Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, 51 Fed. Reg. 9852, 9853 (March 21, 1986).

⁸ Letter from Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, to Charles D. Hawley, Assistant General Counsel, United States Postal Service, In the Matter of Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, May 2, 1986.

⁹ Letter from Attorney General Edwin Meese III to Postmaster General Albert V. Casey, February 26, 1986.

¹⁰ Letter from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, to Senator Alfonse D'Amato, April 2, 1986.

with Administration policy, unambiguously recognizes the benefits of private sector competition in international mail.¹¹ Moreover, the adoption of this rule would send a clear signal to mailers and foreign nations that the Postal Service will not interfere with the legitimate private competition in international mail.¹² Accordingly, the Department supports the proposed regulation.

II. DISCUSSION

A deep-seated tenet of American government is that competition enhances consumer welfare and therefore should be protected and fostered by the government.¹³ Even regulated markets function best when competition is encouraged to the

¹¹ As President Reagan wrote to Postmaster General Casey on May 1, 1986, it is the policy of the Administration to "permit and promote competition in international mail."

¹² The Department continues to question the Postal Service's authority to regulate competition in international mail. See Remail Comments, *supra*, at 12-18. The Postal Service relies on 39 U.S.C. § 602 as the basis for this authority. 51 Fed. Reg. at 21,930. However, by its very terms, Section 602 does not prohibit the conduct of remailers that rely on air transportation. Rather, Section 602 merely "prohibits a vessel from departing from the United States for foreign ports from receiving letters on board except from the Postal Service." 39 U.S.C. § 602 (a). Section 602 is silent as to other forms of conveyance. In contrast, in the Postal Reorganization Act and other parts of the Private Express Statutes, Congress clearly distinguished between "vessels" and other forms of conveyance and employed specific terms to cover other forms of conveyance when it chose to do so.

Our belief that Congress did not intend to confer a monopoly over international mail on the Postal Service is not based solely on the plain meaning of Section 602. Congress' apparent failure to authorize the Postal Rate Commission to review international rates is inconsistent with the view that Congress intended to shelter the Postal Service from competition in international mail. Remail Comments, *supra*, at 16-18. We are aware of no situation in which Congress has conferred a legal monopoly without providing for rate regulation to protect consumers. *Id.* at 17.

¹³ See, e.g., R. Bork, *The Antitrust Paradox* 15-49 (1979).

maximum extent consistent with other regulatory goals. Thus, the Supreme Court has often held that regulatory agencies must facilitate competition:

A policy in favor of competition in the laws as applications in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration.¹⁴

Fostering competitive markets simply is the most effective way to "improve services and reduce costs to our citizens."¹⁵

The benefits to consumers fostered by competition among remailers and the Postal Service in international mail amply demonstrate the salutary effects of competition. Many commenters stated that remail service is faster and cheaper than the Postal Service's own international mail service. As the Postal Service recognizes, hard statistical evidence of the superiority of remail is unnecessary. The fact that consumers use remailers is conclusive evidence that they provide a service demanded by the public.¹⁶ Indeed, even if remailers had not captured a

¹⁴ *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 298 (1974). Similarly, the Court wrote in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), that, when an industry is highly regulated, it is especially important that competition not be limited:

[T]hat there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws.

Id. at 352. See also *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244-46 (1968).

¹⁵ Letter from President Ronald Reagan to Postmaster General Albert V. Casey, May 1, 1986.

¹⁶ Chairman McKean was therefore clearly correct when he stated that remail provides significant benefits to the public. 51 Fed. Reg. at 9853.

significant share of the international mail market, their existence would enhance consumer welfare by spurring the Postal Service to improve services and reduce, prices.

III. CONCLUSION

The Department of Justice strongly endorses the decision of the Postal Service not to attempt to interfere with the operation of a competitive market in international mail service. As the record in this proceeding has demonstrated, competition in that market has provided, and will continue to provide, significant consumer benefits in terms of price and quality of service. In accordance with that record, numerous judicial pronouncements, and the policies of the Administration, the public interest will best be served by decisions of the Postal Service that promote and foster such private sector competition.

Respectfully submitted,

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July 17, 1986

BEFORE THE
UNITED STATES POSTAL SERVICE
WASHINGTON, D.C. 20260 - 1113

IN THE MATTER OF:
Suspension of the Private Express Statutes
for International Remailers

COMMENTS OF THE AMERICAN POSTAL
WORKERS UNION, AFL-CIO, NATIONAL
ASSOCIATION OF LETTER CARRIERS, AFL-CIO

The American Postal Workers Union, AFL-CIO ("APWU"), is a voluntary incorporated labor organization with approximately 250,000 members, and is the exclusive collective bargaining representative of approximately 250,000 employees of the United States Postal Service ("USPS") in the Clerk, Maintenance, Special Delivery Messenger, and Motor Vehicle Service crafts nationwide. The National Association of Letter Carriers, AFL-CIO ("NALC"), is a voluntary unincorporated labor organization with approximately 280,000 members, and is the exclusive collective bargaining representative of approximately 220,000 employees of the USPS in the City Letter Carrier craft nationwide. APWU and NALC members are directly affected in their employment opportunities, and as members of the public and users of the mails, by encroachments on the Private Express Statutes ("PES").

Remailers are used to send bulk mailings, typically involving such items as bank statements, periodicals, catalogues, and advertisements, but rarely individual correspondence. The remailer ships the mail to a foreign postal administration for deposit in its mailstream, paying foreign postage, but no U.S. postage. The postal administration in which the remailer enters the mail is not necessarily that of the ultimate recipient.

Although all parties agree that this mail letter is in no sense time-sensitive, these companies asserted the right to carry such letters out of the mails under the "extremely urgent letters" suspension of the PES. 39 C.F.R. Sec. 320.6. After the Department of Justice declined to seek injunctive relief, assertedly because the USPS's regulations were ambiguous as they applied to remailers, the USPS served notice on October 10, 1985, of its intent to clarify the rules applying the PES to remailers. 50 FR 41,462. Thereafter, upon orders of John McKean, Chairman of the USPS Board of Governors—in circumstances and for reasons not fully known—on March 21, 1986, the USPS withdrew its proposal and invited comments on the total exemption of remailers from the PES. 55 FR 9852. Now the USPS proposes to promulgate such a rule. 51 FR 21,929. These comments are submitted pursuant to the notice of June 17, 1986, in opposition to the proposed rule.

I. History of the PES

The modern postal monopoly is said to be the "foundation of the postal system." Priest, *The History of the Postal Monopoly in the United States*, 18 Jour. of Law & Econ. 33-38 (1975) ("Hist."); *Statutes Restricting Private Carriage of Mail and their Administration*, Comm. on P.O. & C.S. Print No. 93-5, 93d Cong., 1st Sess. 55-56 (June 29, 1973) ("1973 Rept."). A monopoly was found in the Articles of Confederation. It was established by the Continental Congress in 1775; and, in 1782, Congress prohibited competition with the Post Office. Considered an important investment in the infrastructure of the new nation, George Washington used this power as a political means of unifying the country by subsidizing service to the South and West in exchange for their support for the national government. In 1792, Congress embarked on a large-scale expansion of postal routes, and greatly increased penalties for violations. By 1794, it was necessary to crack down on carriage of mail by transportation employees. Hist. at 45-55; 1973 Rept. at 57.

In 1825, Congress clarified and tightened the PES. Amendments in 1827, 1836, and 1838 plugged loopholes in them. The rates in effect the subsidization of frontier routes as the country expanded westward. Hist. at 55-56; 1973 Rept. at 57-58.

By 1820, private expresses and messengers had begun to cut into the monopoly, and by 1840, there was widespread abandonment of the government's service. It responded with stricter enforcement of the 1825 and 1827 acts. But court decisions created loopholes in these laws. In 1844-1845, reform of the post office was the "leading public issue of the day." Hist. at 62. The postmaster general declared that "the only method to defeat the private expresses is to enact stricter laws prohibiting private carriage and to impose heavier penalties for violations." *Id.* at 63.

The PES as we know them were drafted by Senator William Merrick of Maryland and passed in 1845, "the only major congressional consideration of the postal monopoly in the nation's history." *Id.* at 65. Congress concluded that (1) the Postal Service could never successfully compete with private expresses; (2) it had a duty to serve rural and frontier areas; (3) cross-subsidization was necessary and desirable; and (4) a monopoly was necessary to cross-subsidization. This law was consciously anti-"free-enterprise," and private expresses were viewed as "selfish" and "predatory." Hist. at 65-66; 1973 Rept. at 58-59. This 1845 law was successful in eliminating the threat to the national postal system. 1973 Rept. at 59. The act has been called "comprehensive" and "airtight." Hist. at 57-58. The last loophole—that for city delivery—was closed in 1863. 1973 Rept. at 59. Free city delivery was established that year, and rural free delivery in 1896. *Id.* at 61.

The various exceptions to the PES were codifications of existing practices. The "special messenger" exception is the oldest, found in the 1972 statute, and the "cargo" exception was

recognized in 1810. 1973 Rept. at 57. Later, private carriage outside the mails was permitted if postage was prepaid and the letters dated and sealed. *Id.* at 59; see 39 U.S.C. sec. 601. In 1879, Congress provided an exception for private carriage of stamped letters being delivered the post office. *Id.*; see 18 U.S.C. sec. 1696(a). "Letters of the carrier" was added in 1909 in recognition of longstanding practice. 1973 Rept. at 59. The PES were put into the criminal code at the time of 1909 codifications. *Id.* In 1934, the "special messenger" exception was limited to carriage of twenty-five letters. Hist. at 67 n.168.

When the Postal Reorganization Act ("PRA") was passed in 1970, Congress ordered the Board of Governors to study whether to continue the PES in their current form. P.L. 91-375, 84 Stat. 719, sec. 7 (Aug. 12, 1970). The Report cited above concluded that they should continue, and that they should be administered in a systematic way through the rulemaking process (at 9-14). It also asserted the right to suspend the PES when public interest so required (at 11), see 39 U.S.C. sec. 601 (b); 39 C.F.R. Part 320.

II. The Purpose of the PES

The PES have been found to be constitutional. See, e.g., *United States v. Black*, 569 F.2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978). Their purpose is to preserve the USPS's revenue base, and to prevent "cream skimming," i.e., the operation of businesses which are not bound by the USPS's universal service and uniform rate requirements, and which pick and choose among the sources of cheaper, easier, and "cleaner" mail, and thus undersell the USPS's rates. See, e.g., *United States Postal Service v. Brennan*, 574 F.2d 712, 715 (2d Cir. 1978) (quoting *Blackham v. Gresham*, 16 F. 609, 612 (C.C.S.D.N.Y. 1883):

If private agencies can be established [to carry letters and other mail matter] the income of the government may be so reduced that the economy

might demand a discontinuance of the system; and thus the business which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for, their profit to exclude localities or classes from the benefit of the services.

Id. See also 1973 Rept., App. F (1973). The PES is a "revenue law." *United States v. Bromley*, 53 U.S. (12 Harv.) 93, 13 L.Ed. 905 (1851). They apply to all classes of mail, and prohibit the private carriage of letters over post routes. *Associated Third Class Mail Users v. USPS*, 600 F.2d 824 (D.C. Cir. 1979). "[A] policy concern clearly implicated in the quest for the proper scope of the monopoly [is] the need to shield postal operations from competition so the Postal Service can adopt nonmarket solutions in its effort to further various rational goals" *Id.* at 826. See, e.g., PRA sec. 101 (postal policy). "[P]ublic policy . . . must be well defined and documented, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759, URWA*, 103 S. Ct. 2177, 2183 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

III. The Proposed Rule Changes of October 10, 1985

The Federal Register notice of March 21, 1986, withdrew that of October 10, 1985. The latter had proposed to "clarify" the PES regulations to remove what was truly a nonexistent ambiguity in the current regulations which prohibit the private carriage of letters by so-called "international remailers" because their operations fail to qualify for the "extremely urgent letter" suspension. We agree with the USPS that this suspension was never intended to allow bulk shipment of non-priority mail

without payment of U.S. postage. To the extent that the proposed suspension acknowledges that current regulations apply to remailers, we agree.

We disagree entirely with the Justice Department's opinion that the regulations were too vague to enforce. That Department has no particular expertise in postal matters; it should have accepted the USPS's interpretation of its own statutes and regulations. Because the USPS's reasoning was neither "plainly erroneous [n]or inconsistent with the purpose of the statutes," *National Retired Teachers Ass'n v. USPS*, 430 F. Supp. 141, 145 n. 20 (D.D.C. 1977), a reviewing court would have sustained the USPS's reading of its own statute. See *Rockville Reminder, Inc. v. USPS*, 480 F.2d 4, 7 (2d Cir. 1973).

The fact that this Administration's Department of Justice refused to allow the USPS to sue to enjoin their operations, 39 U.S.C. 409 (d), is no reason to change the regulations. The USPS is an independent establishment of the Executive Branch of the Government. 39 U.S. sec. 201. Such statutory independence ought to insulate the USPS from the intrusions of politics and ideology in the formulation and implementation of policy and the administration of its own statute. Such protection from political and ideological interference ought not be relaxed to permit the Department of Justice to review and, in effect, regulate the USPS's most fundamental policy and litigation decisions. Unlike the USPS, which is by statute independent and non-political, 39 U.S.C. sec. 201, 1002, administrations change, along with their ideological agendas. If need be, others affected by remailers are certain to enforce the PES. See *NALC v. Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *APWU v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985).

IV. The Record Does Not Demonstrate That the Proposed Suspension is in the Public Interest

The USPS proposed to suspend the PES under 39 U.S.C. sec. 601(b): "The Postal Service may suspend the operation of a part of [sec. 601(a)] upon any mail route where the public interest *requires* the suspension" (emphasis added). It is not sufficient that the suspension is not repugnant to the public interest; the public interest must affirmatively *require* the suspension. The history of the PES, outlined above, demonstrates that, from the founding of the Republic, Congress created the monopoly, and at every turn strengthened it. It legislated a blanket prohibition, and closed every known loophole in it, except where it saw fit expressly to make exceptions. (As the USPS is aware, the "extremely urgent letter" suspension is not among the legislated exceptions.) In the PES, and in the policies of the PRA, Congress has forcefully spoken on where it sees the public interest.

The burden is especially heavy on the USPS to *demonstrate* that the public interest requires a deviation from the general rule. Any countervailing policies must be among those embodied in specific statutory pronouncements. *W.R. Grace, supra*. Mere citation to one set of statutes — the antitrust laws — does not make the case for those who support the suspension. Those laws do not legislate the so-called "free market system" into law. They establish principles regulating and fostering competition *where competition exists*. Nothing in the Constitution demands that Congress allow competition. Self-evidently, the operation of a postal service has always been a function of a government, where competition is not the rule. There is simply no legal *right* to compete with the federal government, or to remove the government from a commercial sphere which it has exclusively occupied since the Articles of Confederation. Cf. *Tennessee Electric Power Co. V. TVA*, 306 U.S. 118 (1937). Turning to

the specifics in the record, there exists no support for a finding that the proposed suspension is in the public interest.

A. The Record is Unreliably Weak

The USPS's notice itself acknowledges how weak is the record on which it seeks to base its proposed suspension. The comments submitted are unresponsive to the list of issues on which the USPS solicited responses in its March 21 notice. The record was not compiled at a hearing of any kind. Certainly, the "roundtable" at USPS Headquarters on May 22 does not qualify. The record contains no economic analysis. The "facts" related in them are totally *ex parte* and unreliable. Indeed, the actual operations of remailers are not revealed in any detailed manner. No party has had the opportunity to conduct any discovery of the facts exclusively in the possession of other parties. In particular, the records does not tell us of the following in any reliable way:

- The loss of revenue to the USPS
- The volume of remailed letters
- The extent of demand for remail services, and their value to users
- The impact of a suspension on international postal policy, trade treaty obligations and on international relations in general
- The effect of a suspension on employees of the USPS unless the USPS creates a factual record, one in which confidence reasonably can be placed, it is simply in no position to make a judgment as to whether the public interest demands this suspension.

B. The Specifics in the Record Do not Withstand Analysis

1. *Loss of Revenue.* This ought to be the key question to the USPS. The PES, which are revenue protection measures, compel it to be so. Legalization of remail must be seen for what

it is — a *total giveaway* to companies which use remail services. They are, by this rule, *made exempt* from domestic postage. Instead, they pay *foreign* postage on *each piece* and pay only terminal dues pursuant to the Universal Postal Union rules. Under the proposed rule, the USPS give away international postage, and is, of course, not compensated even by terminal dues or transit fees. It is obvious that the revenue at stake is substantial if, as the remailers allege, an entire industry has grown up and is supported by revenues from international remail (even considering the cost of foreign postage).

The USPS is econometrically sophisticated enough to estimate the revenue loss attributable to remail services and to the proposed rule. Not to have done so is an unconscionable abdication of its responsibilities. For this reason alone, and above all others, the proposed rule should be withdrawn.

Even if the USPS were to accept the unsupported and self-serving estimates of revenue loss of between \$25 million and \$500 million (51 FR at 21,931), we fail to see how the USPS can so casually turn up its nose at this sum of money. The difference will be made up by all other users of the mail. Although users of remail services will benefit from the proposed suspension, all other users of the USPS will suffer correspondingly. Their interests are utterly forgotten in this proposal.¹

¹ A saving grace, not mentioned in the Federal Register notice, is the possibility that the USPS could *compete* with remailers by offering its own services, e.g., International Priority Airmail Service ("IPAS"). Already, business and its allies at DOJ have served notice that they intend to attach the USPS rates as "predatory." See, e.g., Comments of DOJ, dated June 9, 1986; Comments of Int'l Remail Co., dated May 30, 1986. Clearly, these parties do not intend to tolerate this situation. They want the USPS out of this phase of their activities altogether.

The irony here is that the most anti-antitrust administration in memory has stated its intent to scrutinize the USPS's proposal with a fine-toothed comb for the same of private interests in competition with the USPS.

2. *Speed of Service.* There is no believable evidence in the record that remailers deliver better service than international mail. What is known about their operations believes this assertion. Unlike international courier services (e.g., Federal Express, according to its spokesman at the May 22 meeting), remailers ship non-priority letters in bulk as freight, and deposit them in the foreign postal administration. We do not even know whether they are entered at any kind of expedited or priority classification. The USPS, in fact, states that largely these letters are the equivalent of bulk third class material, catalogues, and the like. If speed is truly an issue, the many businesses (and the USPS itself) which provide expedited delivery under the urgent letter suspension supply it.

3. *Cost of Service.* Although there is no reliable data on the cost of remail, the USPS accepts as a given that use of remailers is cheaper than utilization of the USPS. We do not. But even were it true, this fact begs the question under the PES. All competitors of the USPS "skim the cream" in order to undercut the USPS. A service which is universal and features a uniform rate for first class letters is a natural monopoly, as shown in the Board of Governors' 1973 Study. The fact that remailers may skim deserves no weight at all.

4. *International Competition.* We fully agree with the USPS's observation that, on the justification that remailers help United States-based companies to compete in international markets, "the comments provide little more than conclusions," and that its efforts to obtain information on which to base a finding on this issue have failed. That those businesses which use remail services are engaged in international commerce is, of course, true. What they ask for, put it plainly, is a *subsidy* from the USPS. Whether the United States economy is *aided* by their operations, whether they attract or export capital, help or exacerbate the imbalance of United States trade, or provide

employment for American workers, is utterly unknown. Raw ideological pronouncements do not fill the void.

V. The Proposal May have Uncontemplated International Effects

The Universal Postal Union ("UPU"), a United Nations affiliate, regulates the relationship between member postal administrations, including the USPS. The Department of Justice, in its December 12, 1985, comments (at 19-20, n.28) discusses the competition among foreign postal services in international bulk mail. It explains that the UPU has responded to this competition by instituting regulations "that can be viewed as an attempt to enforce an international postal cartel." Put another and less ideological way, it may well be that the UPU is attempting to reassert a *right under treaty* to close the remail loophole. What then, of the United States' international commitments? Is the USPS obliged to help prevent this sort of chiseling? Not only do we know — the USPS informs us that the final treaty itself (the Universal Postal Convention, which was negotiated by the USPS and signed by the President) is not even available at USPS headquarters! Prudence dictates that the USPS stop, think, and investigate before it takes a major step that could violate its international obligations.

VI. The USPS Should Await USPS Investigation Before Acting

All are aware of the scandal surrounding the activities of former Board Vice Chairman Voss. We know that private interests have infiltrated USPS decisionmaking for their own benefit, to the detriment of the public. This remail proposal is so unsupported by facts in the record, so clearly contrary to the USPS's financial interests, and such a complete reversal of the institutional thinking of the USPS, that one must ask how it came about, who influenced it, and why. The USPS is to be commended for looking under stones in the Voss affair, unafraid of the consequences. The same searching inquiry is called for here.

It is preferable that it be done by the USPS itself, instead of in court actions challenging the proposed suspension as contrary to the PRA and beyond the USPS's powers.

CONCLUSION

For these reasons, the proposed rule should be adopted.

Respectfully submitted,

Dated: July 21, 1986

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POSTAL SERVICE

39 CFR Part 320

Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing

AGENCY: Postal Service

ACTION: Final rule.

Summary: This final rule suspends the operation of the Private Express Statutes, 18 U.S.C. 1693-1699, 39 U.S.C. 601-606, with respect to international remailing so as to permit the private, uninterrupted carriage of letter from the United States to a foreign country for ultimate delivery outside of the United States.

EFFECTIVE DATE: September 19, 1986.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2971.

SUPPLEMENTARY INFORMATION: On June 17, 1986, the Postal Service proposed to suspend the Private Express Statutes to permit "international remailing." The adoption of this rule completes a public rulemaking process that began with the publication of a Notice of Proposed Rulemaking in October 1985.

"International remailing" consists of the carriage by private firms of shipments of letters, addressed to persons outside the United States, entirely outside of the United States Mails to foreign countries where the letters are deposited into the mails of foreign postal administrations.

The proposal establishes in the Federal Register of October 10, 1985, 50 FR 41462, would have amended the regulation establishing the administrative suspension of the Statutes for extremely urgent letters, 39 CFR 320.6, so as to make clear that

this suspension, which had not been intended to authorize remailing, did not in fact do so. Most of the comments submitted in response to the notice opposed the proposal, and instead supported the practice of remailing. Subsequently, on March 4, 1966, the Chairman of the Board of Governors of the Postal Service would commence a new rulemaking proceeding to establish the lawfulness of remailing.

On March 21, 1966, the Postal Service published a Federal Register notice which withdrew the October 10, 1985 proposed rule, and solicited information on the nature and extent of remailing and on the benefits derived by the public from this practice. 51FR 9852. In addition, the Postal Service, following the close of the period established for response to the March 21 solicitation, held a public meeting on May 22, 1986. (Notice of this meeting was published on May 12, 1986, 51 FR 17366). The information garnered in the successive steps described above forms the factual record upon which the Postal Service based the proposal, in the Federal Register on June 17, 1986, to permit remailing.

Nine additional comments were submitted in response to the June 17 notice. Eight of the comments expressed support for the proposal. Five expressed general support for the suspension and did not suggest any specific changes; three suggested that the suspension be modified in various ways. After careful consideration of all the comments, including those submitted in previous related proceedings, the Postal Service, also bringing to the process its knowledge of and experience with the international mails, has concluded that the proposed suspension should be adopted without substantial modification. The statement of the purpose of this rule and the basis for it, which was published in the June 17 notice, and also the March 27 notice, are incorporated herein and form integral parts of this notice.

Applicability of Private Express Statutes to International Remailing.

Two of the comments submitted in response to the June 17 notice, although generally supporting the proposal, raised the threshold questions of whether the Private Express Statutes have any applicability to the international carriage of letters and whether the Postal Service has the authority to adopt a suspension to regulate the international private carriage of letters. These questions had been raised in the earlier comments and were carefully considered at that time. The Postal Service reiterates its statement on these questions which was published in the June 17 notice.

On the matter of the authority to regulate international remailing, one comment contended that this power should be vested in the Executive Branch, in particular the Department of Justice, and not the Postal Service. The comment also suggests that rather than adopting a regulation, the proposed suspension should be recast as a statement of general policy. In adopting the suspension, however, the Postal Service is acting pursuant to authority specifically and exclusively delegated to it by Congress in the Private Express Statutes themselves. 39 U.S.C. 601(b). The Postal Service is also empowered under 39 U.S.C. 401(2) to adopt, amend, and repeal regulations in order to further the objectives of title 39. *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 826 n.5 (D.C. Cir. 1979). This title, of course, includes the statute noted above which authorizes the suspensions. Finally, the Postal Service is itself an independent establishment in the Executive Branch, 39 U.S.C. 201, and as such it is generally not responsible to other Executive Branch agencies in promulgating postal regulations. Nonetheless, the Postal Service has solicited the views of various agencies and has received and considered comments on these proposals from several agencies.

Nonapplicability of Suspension for Extremely Urgent Letters to Remailing

Several comments noted that in adopting a new suspension for remailing the Postal Service is implicitly concluding that the suspension for extremely urgent letters, 39 CFR 320.6, ought not be interpreted as itself permitting remailing. While two comments agreed with this rationale, a third requested that this interpretation be expressly repudiated. The Postal Service, by adopting this suspension for international remailing, has expressly and forthrightly determined that the practice will be permitted, and has stated the conditions under which it will be permitted. The Postal Service has also concluded that remailing need not be sanctioned under the color of a suspension which was intended for another purpose.

Prohibition on Ultimate Delivery Within the United States

One comment objected to the provision which requires that letters carried pursuant to the suspension not be ultimately delivered within the United States. The comment contends that this provision should not be adopted because remailing back into the United States is negligible, and because this limitation is said to prevent Americans from availing themselves of lower postage rates that are offered to non-Americans. These objections are not persuasive, as explained in the June 17 notice.

The new suspension is not intended to allow the practice of mailing in a foreign country matter which is subsequently shipped by the postal administration of that country through the United States, as open or closed transmit mail, under circumstances which cause the United States to incur expenses for which it is not reimbursed. This caveat does not prohibit the private carriage of letters from remailing if that carriage is within the terms of the new suspension, but neither does the suspension limit the remedies available to the Postal Service with respect to transit mail.

Inspections and Audits

With regard to subsection (c) of the suspension, one comment suggested that this provision should be modified to include inspection and audit guidelines, and also to include a requirement that the Postal Inspection Service provide the shipper with advance notice of an inspection or audit, absent reasonable cause to suspect activity not in conformity with the regulation. Another comment advanced the view that subsection (c) should not be adopted because it exceeds the authority of the Postal Service. The Postal Service has concluded that the suggested inclusion of special inspection and audit guidelines in this regulation is unnecessary because these are well established functions of the Inspection Service. The authority of the Postal Service to investigate postal offenses and civil matters relating to the Postal Service is specifically provided by statute, 39 U.S.C. 404(a)(7). We note, moreover, that a similar provision has been included previously in a suspension of the Statutes. See 39 CFR 320.6(e), and compare 39 CFR 320.3(d). The Postal Service has, however, determined that working in subsection (c) should be modified to read:

The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service. ...

This minor modification makes it clear that it is the Postal Inspection Service which authorizes and conducts the inspections and audits.

The Factual Record as Supporting the Suspension

The comment opposed to adoption of the suspension asserted that the record is inadequate to support the adoption of the regulation, and that it is not manifest from the record that the public interest requires the establishment of the suspension. The Postal Service had sought, in its notice of march 21, 1986, and

subsequently to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which the customers of the latter derive. It may well be, however, that because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

The factual record includes the comments received in response to the October 10 and June 17 notices. Information was also obtained in response to the Federal Register notice of March 21 which reprinted and addressed generally a letter, dated March 14, 1966, sent to commenters who responded to the October 10 notice, soliciting further information for the record. The transcript of the public meeting held May 22, 1986 is also part of the record.

The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers, many commenters did provide information, testimonial in nature, indicating that their use of remail services has resulted in time and cost savings. Numerous commenters

noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that, without faster and cheaper services provided remailers, it would not be feasible for their businesses to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that remailing is not authorized under the suspension for extremely urgent letters, were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

Content of the Suspension

The suspension, which is codified as § 320.8 of title 30, Code of Federal Regulations, suspends, in § 320.6 operation of the Statutes:

to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery within the United States:

This suspension shall not permit the shipment of carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

A third provision, in § 320.8(c), generally authorizes the Postal Service, after notice and hearing, to revoke the suspension for a period of one year, as to a particular shipper or carrier operating in violation of the suspension. This provision also provides that a shipper or carrier's failure to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service would, for the purpose of proceedings under this subsection create a presumption of a violation. This has the effect of shifting the burden of demonstrating compliance to the

shipper or carrier, who would have access to relevant information which its failure to cooperate has denied to the Postal Service.

In view of the considerations discussed above, 39 CFR Part 320 is ***as follows:

List of Subjects in 39 CFR Part 320

Postal Service, Computer technology, Advertising.

PART 320-SUSPENSION OF THE PRIVATE EXPRESS STATUTES

1. The authority citation for Part 320 is revised to read as set forth below, and the authority citations following all the sections in Part 320 are removed.

Authority: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699.

2. A new § 320.8 is added to read as follows:

§ 320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

Example (1) The letters to overseas customers of commercial firm A in Chicago are carried by Carrier B to New York where they are delivered to Carrier C for carriage to Europe. Carrier C holds the letters in its distribution center overnight, then sorts them by country of destination and merges them with letters of other firms to those countries before starting the carriage to Europe in the morning. The carriage of firm A's

letter is not interrupted. The suspension for international remailing applies to the carriage by Carrier B and by Carrier C.

Example (2) The bills addressed to foreign customers of the Chicago branch office of commercial firm D are carried by Carrier E to New York where they are delivered to the accounting department of firm D's home office. The accounting department uses the information in the bills to prepare its reports of accounts receivable. The bills are then returned to Carrier E which carries them directly to Europe where they are entered into the mails of a foreign country. The carriage of the bills from Chicago to Europe is interrupted in New York by the delivery to firm D's home office. The suspension for international remailing does not apply to the carriage from Chicago to New York. It does apply to the subsequent carriage from New York to Europe.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

Example (1) A number of promotional letters originated by firm F in Los Angeles are carried by Carrier G to Europe for deposit in the mails of a foreign country. Some of the letters are addressed to persons in Europe, some to persons in the United States. The suspension for international remailing does not apply to the letters addressed to persons in the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding instituted by the General Counsel in accordance with Part 959 of this chapter. The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the

burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the private Express Statutes by administrative proceedings for *** of postage (see § 310.5) or by civil or criminal proceedings.

Fred Eggleston,
Assistant General Counsel, Legislative Division.

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Billing Code 7710-12-M

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN POSTAL WORKERS UNION, AFL-CIO
1300 L Street, N.W.
Washington, D.C. 20005

**NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO**
100 Indiana Avenue, N.W.
Washington, D.C. 20001
Plaintiffs

v.

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza
Washington, D.C. 200260
Defendant.
Civil Action No. 87-3199

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is an action for declaratory and injunctive relief or, in the alternative, for a writ of mandamus, to challenge the authority of the United States Postal Service ("USPS") to issue regulations suspending the operation of the Private Express Statutes ("P.E.S."), 39 U.S.C. §§601-606, and 18 U.S.C. §§1693-1699, 1724, for the international remailing where it has not been demonstrated that the public interest requires the suspension within the meaning of 39 U.S.C. §601(b). Plaintiffs assert claims under the P.E.S.; 39 C.F.R. part 320; the Declaratory Judgments Act, 28 U.S.C. §2201; and the federal mandamus statute, 28 U.S.C. §1361.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 39 U.S.C. §409 and 28 U.S.C. §§1331, 1361 and 2201.

3. Venue lies within this district pursuant to 28 U.S.C. §1391(e).

PARTIES

4. Plaintiff American Postal Workers Union, AFL-CIO ("APWU") is a national labor organization which represents for purposes of collective bargaining approximately 250,000 employees of the USPS in the clerk, maintenance, special delivery messenger, and motor vehicle service crafts nationwide.

5. Plaintiff National Association of Letter Carriers, AFL-CIO ("NALC") is a national labor organization which represents for purposes of collective bargaining approximately 220,000 employees of the United States Postal Service ("USPS") in the city letter carrier craft nationwide.

6. Defendant United States Postal Service ("USPS" or Postal Service") is an independent establishment of the executive branch of the United States government, established pursuant to 39 U.S.C §201.

STATUTORY AND REGULATORY FRAMEWORK

7. The PES generally prohibit the private carriage of letters over post routes. 39 U.S.C §§ 601-606. Pursuant to Postal Service regulation, a letter is defined as a message directed to a specific person or address and recorded in or on a tangible object. 39 C.F.R. §310.1(a).

8. A person who carries mail or who establishes a private express for the conveyance of letters or packets may be fined or imprisoned. 18 U.S.C. §§1693-1699, 1724.

9. The purpose of the PES is to preserve the USPS's revenue base by prohibiting private competition with the Postal Service, thereby insuring the maintenance and development of high standards of postal delivery through the United States. The statutes prevent the skimming of revenues by businesses which are not bound by the USPS's universal service and uniform rate requirements who compete in the cheaper, easier classes of mail.

10. The Postal Service is authorized to suspend the operation of the PES upon any mail route where the public interest requires the suspension. 39 U.S.C. §601(b).

11. While the USPS is generally exempt from the provisions of the Administrative Procedures Act ("APA"), 5. U.S.C. Chapters 5 and 7, 39 U.S.C. §410, it voluntarily follows APA procedures. 39 C.F.R. §310.7.

THE FACTS

12. On October 10, 1985, an amendment to the regulations suspending the P.E.S. for extremely urgent letters was proposed by the Postal Service and published in the Federal Register in order to clarify that the suspension for extremely urgent letters was not intended to authorize international remailing.

13. On March 4, 1986, the Chairman of the Board of Governors of the Postal Service announced the commencement of new rulemaking proceeding to suspend the PES for international remailing and the proposed rule published on October 10, 1985, was withdrawn in a March 21, 1986 Federal Register notice. The March 21, 1985 notice solicited information on remailing and the benefits derived by the public from the practice.

14. The USPS received comments in response to the proposed regulation and held a public meeting on May 22, 1986. APWU and NALC submitted comments in opposition to the suspension and attended the May 22, 1986 meeting, in which

they pointed out that no comprehensive information had been received demonstrating that the public interest requires the suspension of the PES for international remailers.

15. In spite of the lack of factual support, on August 20, 1986, the Postal Service published a notice of final rule suspending the operation of 39 U.S.C. §601(a)(1)-(6) and 39 C.F.R. part 310.2 (b)(1)-(6) on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery outside of the United States. 39 C.F.R. §320.8.

16. As a result of this suspension, the Postal Service has lost substantial revenue to the overall detriment of the nationwide postal system. APWU and NALC members also have been directly affected in their employment opportunities by this suspension.

17. On June 1, 1987, the APWU and NALC petitioned the Postal Service to rescind the regulations. On July 28, 1987, the Postal Service denied the petition.

CLAIMS FOR RELIEF

18. The defendant Postal Service has violated the P.E.S. through the actions described in paragraphs (12) through (16). Specifically, the defendant has promulgated a regulation suspending the P.E.S. for international remailing without adequate evidence demonstrating that the public interest requires the suspension as required by 39 U.S.C. §601(b).

19. The defendants actions, as described above, were: a) arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations; and unwarranted by the facts within the meaning of 5 U.S.C. §706; b) beyond the ruling making powers conferred by 39 U.S.C. §401(2); and/or c) not in accordance with 39 U.S.C. §601.

WHEREFORE, plaintiffs respectfully request that this court provide the following relief:

(a) a declaratory judgment declaring that defendant's action promulgating 39 C.F.R. §320.8 violated the P.E.S.;

(b) a preliminary and permanent injunction or, in the alternative, a writ of mandamus (1) requiring defendant to revoke 39 C.F.R. §320.8 and (2) prohibiting defendant from giving effect to 39 C.F.R. §320.8.

(c) an order awarding plaintiff his costs, disbursements, and reasonable attorney's fees; and

(d) such other and further relief as the Court may deem appropriate.

Dated: November 16, 1987

Respectfully submitted,

Anton G. Hajjar
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, and NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO,
Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant.
Civil Action No. 87-3199 CRR

ANSWER

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiffs lack standing to bring this action.

THIRD DEFENSE

In response to the numbered paragraphs of the complaint, defendant admits, denies, or otherwise avers as follows:

INTRODUCTION

1. This paragraph contains plaintiff's characterization of this action to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

JURISDICTION

2. This paragraph contains plaintiffs' jurisdictional allegations to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

3. This paragraph contains conclusions of law to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

PARTIES

4-6. Admits.

STATUTORY AND REGULATORY FRAMEWORK

7-8. Defendant neither admits nor denies the allegations in these paragraphs, but respectfully refers the Court to the cited statutory and regulatory provisions for a full, complete and accurate statement of their contents.

9. Defendant denies the allegations in this paragraph, and respectfully refers to the Court to the relevant statutes and their legislative history for a full, complete and accurate statement of their contents.

10. Admits.

11. Defendant admits that it is generally exempt from the application of the Administrative Procedure Act ("APA") to the exercise of its powers, but that it has committed itself, by regulation, to follow the rulemaking provisions of the APA in connection with the promulgation of regulations concerning the Private Express Statutes. Defendant otherwise denies the allegations in this paragraph.

THE FACTS

12. Admits.

13. As to the first sentence, defendant admits that on March 4, 1986, the Chairman of the Board of Governors of the Postal Service announced that a new rulemaking proceeding would be initiated concerning the suspension of the Private Express Statutes for international remailing, but respectfully refers the Court to the cited announcement for a full and complete statement of its contents. Defendant further admits that the proposed rule published on October 10, 1985, was

withdrawn in a March 21, 1986 Federal Register notice. As to the second sentence, defendant admits that the March 21, 1986 notice solicited information on remailing, but respectfully refers the Court to the cited notice for a full, complete, and accurate statement of its contents.

14. Defendant admits the allegations in the first sentence of this paragraph. Defendant admits that plaintiffs submitted comments in opposition to the proposed regulation, and attended the public meeting on May 22, 1986, as alleged in the second sentence of this paragraph. Defendant neither admits nor denies plaintiffs' characterization of the substance of their comments, but respectfully refers the Court to the cited comments for a full, complete and accurate statement of their contents.

15. Defendant admits that, on August 20, 1986, it published a notice of final rule suspending the operation of the Private Express Statutes for international remailing, but respectfully refers the Court to the cited Federal Register notice for a full, complete, and accurate statement of its contents. Defendant otherwise denies the allegations in this paragraph.

16. Defendant denies the allegations in the first sentence of this paragraph. Defendant denies the allegations in the first sentence of this paragraph. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of this paragraph, and therefore denies the same.

17. Admits.

CLAIMS FOR RELIEF

18-19. These paragraphs contain conclusions of law to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

The plaintiffs are not entitled to the relief sought in the complaint or to any relief whatsoever.

Except to the extent expressly admitted or qualified above, defendant denies each and every allegation in the complaint.

Having fully answered, defendant respectfully requests that the Courts dismiss this case with prejudice, award defendant its costs, and grant such other relief as may be appropriate.

Respectfully submitted,

Joseph E. DiGenova,

D.C. Bar #073320

United States Attorney

John D. Bates, D.C. Bar #934927

Assistant United States Attorney

Wilma A. Lewis, D.C. Bar #358637

Assistant United States Attorney

OF COUNSEL:

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United States Postal Service

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, *et al.*,
Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant.
Civil Action No. 87-3199 CRR

**DEFENDANT'S MOTION TO DISMISS OR IN
THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, defendant United States Postal Service moves this Court for an Order dismissing this action on the ground that the plaintiffs lack standing to bring this action, and this Court therefore lacks jurisdiction to entertain plaintiffs' claims. Alternatively, defendant moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an Order entering summary judgment in its favor on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

In support of this motion, defendant refers the Court to the attached statement of material facts as to which there is no genuine issue, memorandum of points and authorities, declaration of Charles D. Hawley and the administrative record filed contemporaneously herewith.

Respectfully submitted,

JAY B. STEPHENS,
D.C. Bar #177840
United States Attorney

JOHN D. BATES, D.C. Bar #934927
Assistant United States Attorney

WILMA A. LEWIS,
D.C. Bar #358637
Assistant United States Attorney

OF COUNSEL:

CHARLES D. HAWLEY
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General Administrative
Law Division
Law Department
United States Postal Service

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, *et al.*,
Plaintiffs,

v.

UNITED STATES POSTAL SERVICE
Defendant.
Civil Action No. 87-3199 CRR

DECLARATION OF CHARLES D. HAWLEY

I, Charles D. Hawley, declare as follows:

1. I am the Assistant General Counsel of the General Administrative Law Division, United States Postal Service. I have been employed with the Postal Service for nineteen years.

2. The Administrative Law Division was responsible for conducting the rulemaking involving the suspension of the Private Express Statutes for international remailing, including the publishing of notices in the Federal Register, the compilation and review of the Administrative record and the promulgation of the final rule. As the official in charge of the Administrative Law Division, I was primarily responsible for conducting the rulemaking.

3. In about 1982, the Postal Service became aware that a few firms were offering a service that came to be known as international remailing. This service, of interest to mailers of large numbers of letters to addressees overseas, involves the collection of mailable matter from a sender and their carriage, outside of the mail stream, to some point outside the United States. There, the letters are entered into the mails of the foreign country, at rates charged by that country's postal administration, for delivery in normal course to the individual addressees. The

country in which the letters are mailed may be the country in which the letters are to be delivered, but it need not be and typically not.

4. The Postal Service believed that the practice of international remailing violated the Private Express Statutes, the laws which make it unlawful, with certain exceptions, to carry letters or packets over postal routes unless postage is paid to the Postal Service. We believed that the remailers' activities were unlawful because once they received letters from the senders, they carried the letters over postal routes for varying distances before getting them out of the United States.

5. The regulation that was generally relied upon to support the practice of remailing was the suspension of the Private Express Statutes for extremely urgent letters, 39 C.F.R. § 320.6. This suspension had been adopted to sender and recipient, required delivery in a shorter period of time than the Postal Service could provide. It provided two alternative sets of conditions which, if either were met, would allow private carriage without payment of postage to the Postal Service. One condition was a "cost" test, on the theory that if the shipper were willing to pay a carrier a sufficient premium for the carriage of a letter it was likely that the letter was, in fact, extremely urgent. To meet this test the shipper had to pay the carrier for each letter the greater of \$3.00 or twice the domestic First Class Mail rate for a letter of the same weight. The rule also provided that a shipment consisting of "a number of letters ... picked up together at a single origin and delivered together at a single destination" should be treated as a single letter for the purpose of applying the cost test. 39 C.F.R. § 320.6(c). This provision had been intended to simplify the computation and reduce the cost of multiple letters written in one location and utilized at a second, e.g., two offices of a corporation in different cities. Its significance, however, if applied to all of a shipper's letters carried at one time by a remailer, was that the cost test was rendered

meaningless because the premium cost to the shipper would be spread over so great a number of letters that it would lose its effect.

6. In October of 1985, we initiated a rulemaking proceeding to amend the applicable regulation to state unequivocally that a shipment of letters intended for ultimate delivery to diverse addressees could not be treated as a single letter under the cost test, and thus the practice of international remailing did not fall within the scope of the suspension for extremely urgent letters. 50 Fed. Reg. 41462 (October 10, 1985).

7. The notice of proposed rulemaking elicited over eighty comments, virtually all of them opposed. Most of the comments indicated that the service they received from remailers was less expensive than the Air Mail rates charged by the Postal Service; that the remailers' delivery times were generally faster; and that international remailing allowed them to remain competitive abroad. We also received a number of comments from officials in the executive and legislative branches of the federal government who cited the benefits said to be achieved from competition in international mail and increased competitiveness of United States firms abroad.

8. In March, 1986, John McKean, the then Chairman of the Postal Service Board of Governors, issued a statement that the Postal Service would be acting to "remove the cloud" over the lawfulness of remailing and would be undertaking a new rulemaking proceeding to establish a record upon which to base our action.

9. Following Mr. McKean's announcement, the Postal Service wrote, on March 14, 1986, to each person who had submitted comments on the October 1985 proposal, informing them of the change of direction, withdrawing the original proposal and soliciting information for the prospective rulemaking. We requested factual information on a number of matters bearing on the issue of speed and reliability of service for letters

sent through remailers. A public notice in the Federal Register on March 21, 1986, which contained the text of the March 14, 1986 letter, invited similar responses from the general public.

10. A number of comments were received after the March 21, 1986 Federal Register notice. Those comments were generally consistent in tone and substance with the comments to the October, 1985 notice. On May 12, 1986, we published a notice in the Federal Register to announce that a public meeting would be held concerning international remailing. At this informal public meeting, held on May 22, 1986, there was opportunity for general discussion and for oral comments both on the issues and on the form that a suspension of the Private Express Statutes for remailing might take.

11. On June 17, 1986 we published a proposed rule in the Federal Register to suspend the operation of the Private Express Statutes for international remailing. Prior to publication of the June notice, we reviewed all the comments carefully. While they lacked in certain respects the detailed factual information we had hoped to gather at the onset of the rulemaking, it was clear that the overwhelming majority of those who commented favored the suspension, consistently citing cost, speed, service and competitiveness in international markets as reasons in support of their position. The Postal Service has no systematically-compiled information as to the delivery performance of foreign postal administrations with either remailed letters or those mailed through the U.S. Postal Service. However, we believed that the claims made by those in favor of the proposed rule were entitled to weight in view of the consistency of the comments, the reasonableness of the conclusion that remailing generally assists American firms in the international markets, and our known knowledge that remailers as a group charge lower rates than the prevailing rates for the Postal Service's international air mail service.

12. We also considered the revenue effect of the proposed rule. The in-house data systems of the Postal Service are not designed to measure how much of the surface and air mail volume loss of recent years is due to the remail industry. The relative newness of the remail industry, combined with competition from other forms of international communication, such as electronic communication, has made such data collection infeasible. Accordingly, we assessed the revenue effect using the most pessimistic forecast of revenue impact. Specifically, we assumed that the amount of revenue diverted by international remailing would be equal to the total amount of revenue received from international mail during the most recent period (\$882.3 million or 3.2% of total postal revenues). This amount was necessarily overinclusive because it included mail that was not protected from competition under the Private Express Statutes and assumed that the Postal Service would lose all its international mail volume to remailers. Using this pessimistic forecast of revenue impact, we concluded that the revenue loss did not outweigh the perceived public benefit from allowing international remailing.

13. After the publication of the June notice, we received a few other comments, virtually all in favor of the suspension. Prior to Adopting the rule, we again carefully considered the entire record, including the concern expressed by the plaintiffs in this case regarding the inadequacy of the record to support the suspension. We considered the fact that we had not received the comprehensive information that we had originally sought. However, we recognized that such detailed information might be unavailable due to the relative newness of the remail industry and the diverse character of the industry. In any event, as we explained in the discussion that accompanied the publication of the final rule in the Federal Register, we believed that the comments submitted supported the conclusion that the public interest required the suspension. See 51 Fed. Reg. at 29637.

Accordingly, the final rule suspending the Private Express Statutes for international remailing was adopted.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 25th day of March, 1988.

Charles D. Hawley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, *et al.*,
Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant
Civil Action No. 87-3199 CRR

DECLARATION OF CHARLES D. HAWLEY

I. Charles D. Hawley, declare as follows:

1. I am the Assistant General Counsel of the General Administrative Law Division, United States Postal Service. I have been employed with the Postal Service for nineteen years.

2. The Administrative Law Division was responsible for conducting the rulemaking involving the suspension of the Private Express Statutes for international remailing, including the compilation and review of the administrative record. As the official in charge of the Administrative Law Division, I was primarily responsible for the foregoing tasks.

3. I certify that the attached documents constitute the entire administrative record compiled in the promulgation of the rule suspending the Private Express Statutes for international remailing. 51 Fed. Reg. 29636 (August 20, 1986).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executive this 25th day of March, 1988.

Charles D. Hawley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS
UNION, AFL-CIO, *et al.*,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant.

Civil Action No. 87-3199 (CRR)

INDEX TO ADMINISTRATIVE RECORD

1. *October 10, 1985* Federal Register Notice: Proposed Rule, "Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters."

Comments received after the October 10, 1985 notice:

2. *October 21, 1985* letter from R.L. Bulger, Vice President, Harry and David Orchards.

3. *October 28, 1985* letter from Larry P. Rodberg, President, Air Courier Conference of America.

4. *November 4, 1985* letter from David B. Popkin, private citizen, Englewood, New Jersey.

5. *November 12, 1985* letter from Richard P. Stephenson, Chief, Mail and Correspondence, General Services Administration.

6. Letter from John Elting Treat, Executive Publisher, Petroleum Intelligence Weekly.

7. *November 8, 1985* letter from J. Craig Johnson, President Johnson & Hayward.
8. *November 7, 1985* letter from David Shapiro, Traffic Manager, Boarts International, Inc.
9. *November 8, 1985* letter from David Lesser, Vice President and Associate General Counsel of Riggs National Bank.
10. *October 23, 1985* letter from Congressman Mickey Leland and Frank Horton requesting information and extension of time and *November 20, 1985* response.
11. *October 29, 1985* letter from Senator Ted Stevens to Postmaster General Carlin and *November 14, 1985* response.
12. *November 21, 1985* letter from Timothy M. Spicer, Senior Vice President and Chief Financial Officer, Hambrecht & Quist, Inc.
13. *November 25, 1985* letter from David M. Block, of The Book Block.
14. *November 26, 1985* letter from Mehrnoz Rubin, Director of Operations, Business Communications Co., Inc.
15. *November 26, 1985* letter from George E. Lockwood, Jr., President, Lockwood Trade Journal Co., Inc.
16. *December 3, 1985* letter from James M. Jenks, President of the Alexander Hamilton Institute Incorporated.
17. *December 10, 1985* letter with enclosed comments from Robert S. Taylor, Attorney for Newsweek, Inc.
18. *December 5, 1985* letter from Karen Moore, International Direct Marketing Representative from Mosby International.
19. *November 27, 1985* letter from Andrea Millen Rich of Laissez Faire Books.
20. *December 9, 1985* letter from Frederick W. Smith, Chairman, President and Chief Executive Officer, Federal Express.

21. *December 4, 1985* letter from Roy Harry, President, Airsystems Courier.
22. *December 5, 1985* letter from Jerry J. Floom, President, Jet Courier International, and letter from Congressman Philip Crane.
23. *December 11, 1985* letter from Timothy J. May, Counsel for the New York Document Exchange (NYDEX).
24. *December 9, 1985* letter from William Hearn, President, International Executive Reports.
25. *December 9, 1985* letter from John J. Gill, General Counsel, American Bankers Association.
26. *December 11, 1985* letter from Irwin L. Gubman, Senior Vice President and Associate General Counsel, Bank America Corporation.
27. *December 12, 1985* letter from Peter A. Greene, forwarding comments of Armando Labrada, Vice President & Assistant General Counsel, Purolator Courier Corp.
28. *December 12, 1985* letter from Martin L. Stern, Attorney, Antitrust Division, forwarding the comments of the Justice Department.
29. *December 12, 1985* letter from John M. Burzio, Counsel for The New Postal Policy Council.
30. *December 12, 1985* letter from Kenneth B. Allen, Vice President, Government Relations, Information Industry Association.
31. *December 12, 1985* letter from Richard Littell, Counsel for DHL Airways, Inc., Emery Worldwide, Airborne Freight Corporation, and United Parcel Service.
32. *December 12, 1985* letter from James I. Campbell, Jr., Counsel for the Committee on International Remail, enclosing the Committee's comments.

33. *December 12, 1985* letter from James I. Campbell, Jr., enclosing other comments (found here at numbers 34 through 56).
34. *November 20, 1985* letter from Dave Smith, Manager, Corporate Mail Services, Amdahl Corporation. (Enclosure from 33)
35. *November 27, 1985* letter from Glenda Peters, Supervisor, Mailing Services, ARMCO, Inc. (Enclosure from 33)
36. *November 15, 1985* letter from Barbara B. Pearson, Administrative Assistant, International Department, Bentley International. (Enclosure from 33)
37. *November 7, 1985* letter from David Shapiro, Traffic Manager, Boarts International, Inc. (Enclosure from 33, same as Number 8 of this listing)
38. *November 19, 1985* letter from Debbie Rowland, Manager of International Marketing Support from Cardkey Systems. (Enclosure from 33)
39. Letter from Will Tarbox of Esprit. (Enclosure from 33)
40. *November 21, 1985* letter from Timothy M. Spicer, Hambrecht & Quist, Inc. (Enclosure from 33; same letter as number 12 of this listing.)
41. *November 18, 1985* letter from Edward Romero of the Corporate Mail Distribution Center at Hewlett Packard. (Enclosure from 33)
42. *November 19, 1985* letter from Kevin J. Murphy, President, K.J. Murphy & Co. (Enclosure from 33)
43. *November 19, 1985* letter from L.J. Peretzman, Traffic Manager of Maurice Pincoffs Company. (Enclosure from 33)
44. *November 21, 1985* letter from William E. Isabelle, Jr., Manager, Universal Studios Mailroom. (Enclosure from 33)

45. *November 25, 1985* letter from Elizabeth Haran, Office Manager of Medcom, Inc. (Enclosure from 33)
46. Letter from April Keene, Account Representative in International Sales from MicroPro International Corporation. (Enclosure from 33).
47. *November 20, 1985* letter from John J. Wagner, Supervisor, Export Customer Service, with Multigraphics. (Enclosure from 33)
48. *December 3, 1985* letter from L.R. Gess, Manager, Export Sales & Service, Nalco Chemical Company. (Enclosure from 33).
49. *November 18, 1985* letter from Joan I. Black of Pannell, Kerr and Forster. (Enclosure from 33)
50. Letter from John Elting Treat, Executive Publisher of Petroleum Intelligence Weekly. (Enclosure from 33, same letter as number 6 of this listing.)
51. Letter from Maurice Price, Circulation Manager of Petroleum Management. (Enclosure from 33)
52. Letter from Bruce C. Lyle of the Port of Houston Authority. (Enclosure from 33)
53. *November 8, 1985* letter from David Lesser of Riggs National Bank. (Enclosure from 33, same letter as number 9 of this listing.)
54. *November 26, 1985* letter from B.F. Carker, Jr., Vice President, Stone Forwarding Company, Inc. (Enclosure from 33)
55. *November 19, 1985* letter from Juanita Schiavoni, Marketing Supervisor of Validyne International, Inc. (Enclosure from 33)
56. Letter from Clarke Grappe, Mail Operations Supervisor, MBank Houston. (Enclosure from 33)

57. *December 23, 1985* letter from James I. Campbell, Jr. Counsel for International Remail Committee, enclosing additional comments (found here at numbers 58 through 61 below).
58. *December 2, 1985* letter from Theresa McCorkhill, Data/Courier Coordinator for Goulds Pumps, Inc. (Enclosure from 57)
59. *December 2, 1985* letter from D.J. Skudlarek, Supervisor, Mail Processing Center, Nalco Chemical Co. (Enclosure from 57)
60. *December 2, 1985* letter from Al Burchett, Shipping/Receiving Manager, Coast Mailing Corporation (Enclosure from 57)
61. *December 2, 1985* letter from Susan T. Lentz, Manager, Marketing Administration, Global. (Enclosure from 57)
62. *December 30, 1985* letter from James I. Campbell, Jr., Counsel for International Remail Committee, enclosing a letter from Victoria Roehling, Promotion Manager for Johnston International Publishing Corp.
63. *November 1, 1985* letter from Andrew J. D'Angelo, President of Distrimail (Originally sent to Senator Alfonse D'Amato).
64. *December 12, 1985* letter from Michael P. Esposito, Jr., Executive Vice President and Controller, Chase Manhattan Bank.
65. *December 12, 1985* letter from Leonard Wieckowski, Publisher, McGraw - Hill, Inc.
66. *December 11, 1985* letter from John H. Ness, Executive Secretary, World Methodist Historical Society.
67. *December 12, 1985* letter from Edward C. Bursk, President, Advanced Management Publishers, Inc.
68. *December 17, 1985* letter from James W. Reapsome, Executive Director, Evangelical Missions Quarterly.

69. *December 23, 1985* letter from Congressman Bernard J. Dwyer.
70. *December 18, 1985* letter from Edgar F. Westrum Jr., Professor of Chemistry, University of Michigan.
71. *December 23, 1985* letter from James Campbell to Postmaster General Carlin for the International Remail Committee opposing the October 1985 proposed rulemaking, and Louis Cox's *January 7, 1987* response.
72. *January 6, 1986* letter from Thomas W. Childs IV, Associate Director, Cyrus J. Lawrence Incorporated.
73. *December 16, 1985* letter from Michael A. Guidice, Marketing Manager, Business Trend Analysts.
74. *December 19, 1985* letter from George C. Bradford, General Secretary, Presbyterian & Reformed Renewal Ministries International.
75. *December 5, 1985* letter from Jerry Floom, President Jet Courier International (originally sent to Senator Paul Simon), *January 2, 1986* letter from Senator Simon to James Hitaffer, U.S.P.S., and *January 10, 1986* response to Senator Simon.
76. *January 10, 1986* letter from Congressman Frank Wolfe and *January 31, 1986* response.
77. *January 21, 1986* letter from Laurel B. Kamen and Richard W. Coughenour of The New Postal Policy Council, and the *February 14, 1986* response by Postmaster General Casey.
78. *January 23, 1986* letter from Congressmen Mickey Leland, Frank Horton, Robert Garcia to John McKean, Chairman, U.S.P.S. Board of Governors.
79. *January 29, 1986* letter from Alice J. Irby, Vice President, Educational Testing Service.
80. *February 3, 1986* letter from Senator Rudy Boschwitz.

- 81. *February 12, 1986* letter from Congressman Raymond J. McGrath, and *March 7, 1986* response.
- 82. Letter dated *February 28, 1986* from James C. Miller, Director of the Office of Management and Budget. Includes *March 11, 1986* response from Postmaster General Albert Casey.
- 83. *February 28, 1986* from Malcolm Baldrige, Secretary of Commerce, with response of *March 11, 1986* from Postmaster General Casey.
- 84. *February 27, 1986* letter from Beryl W. Sprinkel, Chairman of the Council of Economic Advisers, with *March 11, 1986* response from Postmaster General Casey.
- 85. *February 26, 1986* letter from Edwin Meese III, Attorney General, Dept. of Justice, with *March 11, 1986* response by Postmaster General Casey.
- 86. *February 24, 1986* letter from Congressman Mervyn M. Dymally.

(End of Comments received after
October 1985 Proposed Rulemaking)

- 87. *October 22, 1985* Federal Register Notice: Correction of Proposed Rule-Change of Phone Number.
- 88. *November 8, 1985* Federal Register Notice. Proposed Rule; Extension of comment period.
- 89. *Minutes of March 3-4, 1986* USPS Board of Governors Meeting with *March 4, 1986* statement by Chairman John R. McKean.
- 90. *March 21, 1986* Federal Register Notice: "Withdrawal of proposed rule; advance notice of proposed rulemaking and request for information."

Comments received after the March 21, 1986 notice:

- 91. *March 19, 1986* letter from James W. Reapsome, Executive Director, Evangelical Missions Quarterly.
- 92. *March 20, 1986* letter from Glenda Peters, Supervisor, Mailing Service ARMCO Corporate Offices.
- 93. *March 26, 1986* letter from Congressman Mickey Leland to Chairman John McKean.
- 94. *March 27, 1986* letter from Congressman Mikey Leland to Chairman John McKean and *April 23, 1986* response.
- 95. *April 2, 1986* letter from John Bolton, Assistant Attorney General, Justice Department, to Senator Alfonse D'Amato. (forwarded to General Counsel of Postal Service).
- 96. *April 11, 1986* letter from Congressman Charles E. Bennett to Postal Service.
- 97. *April 28, 1986* letter from Vincent A. Liguori, Assistant Vice President, the Morgan Bank.
- 98. *April 30, 1986* letter from Michael P. Esposito, Jr., Executive Vice President and Controller, Chase Manhattan Bank.
- 99. *April 29, 1986* letter from Laurel B. Xamen, Chairman and Richard W. Coughenour, Vice Chairman, The New Postal Policy Council.
- 100. *April 30, 1986* letter from Robert S. Taylor, enclosing comments of Newsweek, Inc.
- 101. *April 29, 1986* letter from Frederick W. Smith, Chairman, President and Chief Executive Officer, Federal Express.
- 102. *April 30, 1986* letter from James I. Campbell, Jr., International Remail Committee.
- 103. *April 30, 1986* letter from John J. Gill, General Counsel, American Bankers Association.

104. *May 1, 1986* letter from Ronald Reagan to Postmaster General Casey.

105. *May 1, 1986* letter from Armando Labrada, Vice President and Assistant General Counsel, Purolator Courier.

106. *May 2, 1986* letter from Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, Justice Department.

(End of Comments received after
March 21, 1986 *Federal Register* notice.)

107. *May 12, 1986 Federal Register* Notice: "Notice of public meeting."

108. *Transcript of May 20, 1986* Public Meeting.

109. Comments of the International Remail Committee, *May 30, 1986*.

110. *June 17, 1986 Federal Register* Notice: Proposed Rule, "Restrictions on Private Carriage of Letters; Proposed Suspension of the Private Express Statutes, International Remailing."

Comments received after the June 17, 1986 notice:

111. *July 7, 1986* letter from Laurel B. Kamen, Chairman and Richard W. Coughenour, Vice Chairman of The New Postal Policy Council.

112. *July 1, 1986* letter from Carl M. Wright, Assistant Vice President, First National Bank of Chicago.

113. *July 15, 1986* letter from Mark R. Allen, Senior Attorney, Federal Express.

114. *July 17, 1986* letter from Douglas Ginsburg, enclosing comments from the Department of Justice.

115. *July 17, 1986* letter from Michael P. Esposito, Jr., Executive Vice President, Chase Manhattan Bank.

116. *July 17, 1986* letter from Peter N. Hiebert, enclosing comments of DHL Airways, Inc.

117. *July 17, 1986* letter from Robert S. Taylor, enclosing comments of Newsweek, Inc.

118. *July 17, 1986* comments from the International Remail Committee (James I. Campbell, Jr., Counsel).

119. *July 21, 1986* comments from Anton G. Hajjar, Counsel for American Postal Workers Union and Richard Gilberg, Counsel for National Association of Letter Carriers.

(End of comments received after the June 17, 1986 notice.)

120. *August 1985* Report on the Status of International Mail (Agency Background Knowledge.)

121. *August 20, 1986 Federal Register* Notice: Final Rule, "Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing.

Post-Rule Correspondence:

122. *October 6, 1986* letter from Moe Biller, President, American Postal Workers Union, to Postmaster General Preston Tisch and *October 23, 1986* response.

123. *June 1, 1987*, Petition by the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO, requesting reconsideration of the suspension promulgated on August 20, 1986.

124. *June 8, 1987* Letter from Charles D. Hawley, Assistant General Counsel, U.S.P.S., to Anton G. Hajjar Attorney for the American Postal Workers Union, AFL-CIO.

125. *June 11, 1987* letter from Anton G. Hajjar to Charles D. Hawley, in response to June 8, 1987 letter.

126. July 28, 1987 response from Mr. Hawley on behalf of the Postal Service, denying the Unions petition for reconsideration of the August 20, 1986 suspension.

127. Page 25 of the Annual Report of the Postmaster General, 1985 (Agency Background).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,
AFL-CIO AND NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO,
Plaintiffs

v.

UNITED STATES POSTAL SERVICE,
Defendant.

Civil No. 87-3199
(Richey, J.)

DECLARATION

I, KENNETH D. WILSON, in lieu of an affidavit as permitted by 28 U.S.C. 1746, declare under penalty of perjury that the following is true.

1. I am the Director of the Clerk Division, American Postal Workers Union, AFL-CIO, ("APWU") and have held this position for three years. Prior to that, I was Assistant Director of the Clerk Craft for eight years. I was a postal worker for 31 years until my retirement on October 1, 1987.

2. The APWU is the recognized exclusive collective bargaining representative of employees in four craft units nationwide: clerk, maintenance, special delivery messenger and motor vehicle service. The National Association of Letter Carriers, AFL-CIO ("NALC") is the exclusive collective bargaining representative of city letter carriers nationwide. All these crafts are affected by the volume of international mail.

3. Among the duties of city letter carriers and special delivery messengers is the collection of mail pieces, including international mail, deposited in city collection boxes or handed

directly to them by postal patrons. These are brought to a facility for sortation. If the pieces collected by city letter carriers are brought to a station or branch, it is probable that a member of the motor vehicle service craft will transport this collection mail to a general mail facility. These employees transport mail by truck in bulk. Members of this craft also maintain the vehicles in the USPS fleet. Also, window clerks sell international postage and accept international mail from the public. At the general mail facility, the mail is culled (a rough separation by size) and canceled, either by a machine or by hand. This operation may be done by a member of either the mail handler or the clerk craft. (APWU is not the exclusive representative of the mail handler craft but does have members in this craft.) A piece of outgoing international mail, during the primary distribution (by letter sorting machine ("LSM"), optical character reader ("OCR"), or by hand) is sorted by a member of the clerk craft to a foreign mail hold-out. LSM and OCR operators are members of the clerk craft.

4. A secondary sort is then performed by a member of the clerk craft on an LSM, OCR or by hand, by country or other foreign location (e.g. city). These machines are maintained by members of the maintenance craft, which also supply custodial services to postal facilities. A clerk puts it in a container for transportation to a dispatch point. Most likely a member of the motor vehicle craft would take the container to the domestic airport.

5. The container is then transported by air to a gateway facility of the USPS. This could be for surface (sea) transportation (e.g. the New York Foreign and Bulk Mail Center) or air (e.g. the Air Mail Facility ("AMF") at JFK International Airport). There are many AMFs in the postal system. At these facilities, clerks have various functions. For example, an Air Records Processor will scan the mail to generate a label and a

bill of lading or manifest for the airline carrying the mail overseas.

6. Attached as Attachment A is the USPS's ISAL Service Guide. It explains one of the USPS's bulk international mail systems. Clerks would certainly be involved in ISAL operations. Clerks would process the various forms identified in the Guide, maintain the account balances, issue the permits and verify the mailings. Motor Vehicle operators may also transport ISAL shipments from an acceptance facility to the airport.

7. The Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, required the USPS among other things, to pay \$510 million and \$735 million in FY 1988 and 1989, respectively, into certain U.S. Treasury accounts, and to reduce operating expenses by \$160 million in FY 1988 and 270 million in FY 1989. The USPS was prohibited from meeting these requirements by raising rates (beyond the rate increase recently implemented) or by borrowing. Thereafter, the USPS made these cuts, among other things, by reducing retail window and mail processing hours, directly affecting both services to the public and the schedules and pay of bargaining unit employees. In many areas of the country, post offices have been closed on Saturdays and mail processing curtailed on Sundays. See, e.g., Attachment B.

Dated: April 25, 1988

KENNETH D. WILSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,
ALF-CIO, and NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant.

DECLARATION OF JACK L. RUTNER

I, Dr. Jack L. Rutner, in lieu of an affidavit as permitted by 28 U.S.C. 1746, declare under penalty of perjury that the following is true.

1. I hold a Bachelor of Science degree from Massachusetts Institute of Technology and was awarded a Ph.D. in economics from the University of Chicago in 1974. I am Senior Vice President of the economic consulting firm of Joel Popkin and Co. in Washington, D.C.

2. I have reviewed the cost and revenue data in Postal Rate Commission Dockets R84-1 and R87-1. These data are consistent with the hypothesis that there has been "skimming" of volume in the class of International Mail. Opportunities for "skimming" occur when the marginal cost to the Postal Service of processing a class of mail is below the price charged by the Postal Service for that class of mail.

3. Marginal cost is very difficult to calculate properly from the published data, but one can conclude that skimming has occurred by examining how attributable costs in one class behave in comparison with attributable costs in another class. With the exception of one minor category (government mail), the attributable costs per piece of International Mail has in-

creased much more rapidly than the attributable cost per piece of any other class of mail in the period from the test year of Docket R84-1 (FY 1985) to the test year of Docket R87-1 (FY 1989).

For example:

	FY 1985	FY 1989	% Change
International Mail	75.8¢	108.2¢	42.6%
1st Class Letter Mail	14.9¢	17.4¢	16.8%
2nd Class Regular Mail	12.1¢	14.0¢	15.7%
3rd Class Regular Mail	7.3¢	9.4¢	28.8%
Parcel Post	239.2¢	293.5¢	22.7%

(Source:

Docket R84-1, Appendix G, Schedule 1 (Attachment A)

Docket R87-1, Appendix G, Schedule 1 (Attachment B))

4. These data are consistent with the hypothesis that some volume of international mail which is relatively inexpensive to sort has been diverted from the Postal Service. When such skimming occurs, the Postal Service must ultimately either pass on the increased costs to the remaining international mailers or shift those cost increases to the users of other classes of mail by increasing their rates more than the amount accounted for by cost increases within their class. By comparing revenues per piece in FY 1985 and FY 1989, one observes that revenue per-piece of International Mail has increased only 18.6%, which is substantially below the increase in attributable costs for the same time period. If revenue per piece does not increase as rapidly as attributable cost per piece, then some of the institutional costs of the Postal Service which are borne by International Mail will be shifted to other categories of mail. This means that these rates will increase more rapidly than costs justified by those categories.

Dated: 6/9/88

Jack L. Rutner